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VERSUS Oklahoma

Date	Proceedings and Orders
Apr 29 1987	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 1 1987	DISTRIBUTED. September 28, 1987
Jul 31 1987	Response requested.
Sep 1 1987	Brief of respondent Oklahoma in opposition filed.
Oct 5 1987	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MALCOLM RENT JOHNSON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Does Ake v. Oklahoma require the appointment of a psychiatrist to assist the defense when the state offers evidence of future dangerousness?

2. Does Ake v. Oklahoma and Caldwell v. Mississippi require the appointment of an expert to assist the defense in rebutting testimony by the state's expert on the critical issue of the identity of the assailant?

3. Does Oklahoma's no-sympathy charge, which is not limited as the charge in California v. Brown, combined with a prosecutor's argument ridiculing mitigating evidence violate the eighth and fourteenth amendments?

PARTIES

The parties before this Court are set forth in the caption.

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No. 86 -

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OCTOBER TERM, 1986

MALCOLM RENT JOHNSON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

Petitioner Malcolm Rent Johnson respectfully prays that a writ of certiorari issue in this case to review the judgment of the Court of Criminal Appeals of the State of Oklahoma.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma affirming Johnson's conviction and sentence is set forth at 731 P.2d 993 (Crm. App. 1987). The order denying his petition for rehearing is unpublished and appears in Appendix A attached hereto.

JURISDICTION

The order of the Oklahoma Court of Criminal Appeals denying Johnson's timely petition for rehearing was filed on February 9, 1987. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257(3) and 2253.

Petitioner respectfully requests that this petition, which raises serious constitutional questions concerning (i) the denial of funds for an expert witness, for a psychiatrist, and to investigate mitigating evidence, and (ii) a challenge to a no-sympathy charge, be considered on its merits, although it was not timely filed. Counsel, who did not represent Johnson at trial or on appeal, filed this petition within 8 days of learning that the petition was out of time and within 5 days of receiving the transcript of the hearing at which his motion for funds was denied.

Rule 20.1 of the Rules of the Supreme Court of the United States should be waived in this case "to avoid wasteful circuity", Heflin v. United States, 358 U.S. 415, 418 n.7 (1959), since the federal constitutional issues presented now for this Court's review may be presented in a subsequent application for habeas corpus. Also, Rule 20.1 is not jurisdictional and may be modified to meet the ends of justice. Schacht v. United States, 398 U.S. 58, 63-64 (1970); see R. Stern & E. Gressman, Supreme Court Practice at 389-95 (5th ed. 1978). Since this petition presents issues of great importance to all defendants facing the prospect of capital punishment in Oklahoma, the rule should be relaxed in the interests of justice and the petition considered on its merits.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII of the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Amendment XIV, Section 1 of the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On Tuesday, October 22, 1981, the body of Ura Thompson was found in her apartment by her nephew. (Tr. 484, 544.) At first, those at the scene believed Ms. Thompson had died a natural death. (Tr. 643.) An autopsy, however, revealed that Ms. Thompson had been suffocated, though she had not been strangled. (Tr. 727-28, 719.) The autopsy also showed evidence of forced sexual intercourse prior to death. (Tr. 725-26.)

The Petitioner, Malcolm Rent Johnson, was arrested on a weapons charge five days later. During a search of his apartment, several items belonging to Ms. Thompson were found. Johnson was subsequently charged by information with murder.

A. Pre-Trial Motions By The Defense Seeking Appointment Of A Psychiatrist And A Forensic Chemist

Recognizing that the state's case was in large part dependent on the testimony of a police chemist who would identify semen and fiber samples taken from Ms. Thompson's apartment as consistent with Johnson's blood group and clothing, trial counsel moved for an expert to investigate the physical evidence and to assist the defense.* Counsel also filed three motions seeking assistance in preparing his case in mitigation of the death penalty. He moved for a

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* In a verified motion, counsel demonstrated that to present an adequate defense he required the appointment of an independent chemist to "assist in the preparation and to assist the cross-examination of the State's witnesses." (Motion For Funds For Expert Witness at 1.) Counsel also specifically identified his need for an "expert on electrophoresis" to limit the class of persons with Type B blood responsible for the crime and to eliminate Johnson as the assailant. (Id. at 4.)

pre-sentence investigation by the Oklahoma Department of Corrections to uncover mitigating evidence and to disprove the allegation in the bill of particulars that Johnson exhibited a propensity to commit future acts of violence. He also moved for funds to travel to Illinois to uncover mitigating witnesses. Finally, counsel moved for appointment of a psychiatrist to examine Johnson (i) to determine his mental condition at the time of the offense and (ii) to uncover mitigating circumstances.

On January 28, 1982, a pre-trial hearing was held on Johnson's motions. All of the motions were denied.* The motion judge agreed with counsel that Johnson should have the assistance of a defense chemist but denied the motion on the grounds that such an appointment was prohibited in Oklahoma. (Indeed, he noted that in a prior case he had granted a similar motion by counsel but had been reversed on appeal.) The judge also denied the requests for funds to investigate mitigating evidence and for a psychiatrist.

> [Y]ou can't hire investigators and you can't hire experts and all that....And I think you're right on the law. ... I know you're right.
>
> But the trouble of it is, there's three fellows out there on the State Capitol that say that's not the law....And I think they're flirting with dynamite.

(Transcript of Proceedings held on Jan. 28, 1982 at 16.)

With specific reference to counsel's request for an independent chemist to perform a test known as electrophoresis, a

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* Counsel also moved on March 12, 1982, in the alternative, for a continuance until funds for mitigation investigation and experts were available, or to withdraw as counsel. Counsel argued that without such assistance he could not properly represent Johnson. That motion was also denied.

test that even the state conceded could eliminate Johnson as a suspect, the court held:

> I appointed you an expert before and the Court of Criminal Appeals reversed it. Said you can't do it. I appreciate what you're saying, I understand it. But I'm not going to do it. I've got to follow the Court of Criminal Appeals. Be overruled.

(Id. at 19.)

B. Expert Testimony At the Guilt/Innocence Phase of the Trial

At trial, the state presented a case against Johnson based solely on circumstantial evidence, a brief and ambiguous reply to police questions, and the expert testimony of a chemist employed by the Oklahoma City Police Department. No one identified Johnson as being present in Ms. Thompson's building. Joyce Gilchrist, the police chemist, was the state's star witness -- for her testimony was the only direct evidence placing Johnson in the apartment. She testified that the person whose semen was found on bedcoverings in the apartment was from blood Type B, and that Johnson was blood Type B. She also testified that several hairs and fibers found at the scene were consistent with Johnson's hair and clothing.

Cross-examination demonstrated that Ms. Gilchrist had been employed as a forensic chemist for about 1 1/2 years and had never before testified regarding fiber analysis. She also testified that the test she had performed could only identify that the semen was from someone with Type B blood and that an electrophoresis test, which she did not perform, would have narrowed even further the class of persons with Type B blood whose semen was found.

C. The Penalty Phase Testimony

After the jury returned a verdict of guilty, the state introduced its evidence in aggravation. Johnson's previous convictions in Illinois for two rapes, two armed robberies and one burglary were introduced. The state also introduced testimony that Johnson had committed several other rapes and assaults of elderly women in Oklahoma.

The defense then proceeded to offer testimony and evidence in mitigation designed to evoke the jurors' sympathy and to show that Johnson's medical history and disadvantaged background made him less responsible for his actions and thus undeserving of the death penalty. Testimony was offered to show that Johnson's parents separated when he was quite young, that his father used excessive punishment (consisting of beatings with a leather strap), that his father beat Johnson's mother in his presence, that he suffered from a mysterious, debilitating illness when he was two years old and had been hospitalized (often under restraint) for two months, that Johnson was the oldest of four children, and that at the age of 9 he was responsible for preparing meals for his siblings and for other household duties. No psychiatric testimony was offered by either side.

After charging the jury, both sides presented their closing arguments. Three aggravating circumstances were submitted for the jury's consideration: That Johnson had previously been convicted of a felony, that he was likely to commit future acts of violence, and that the killing was especially heinous, cruel, or atrocious. The jury rejected the aggravating circumstance that the killing was atrocious but found the two closely-related aggravating

circumstances of previous conviction of a felony and future dangerousness. He was then sentenced to death.

REASONS FOR GRANTING THE WRIT

This case presents three substantial constitutional questions each of which warrants the grant of a writ of certiorari. The three questions seek clarification of this Court's previous opinions in Ake v. Oklahoma, 470 U.S. 68 (1985); Caldwell v. Mississippi, 472 U.S. 320 (1985), and California v. Brown, __ U.S. __, 107 S. Ct. 837 (1987).

The first question puts at issue whether the constitution compels a state to appoint a psychiatrist to assist the defense when the prosecution seeks to prove future dangerousness at the penalty phase of a capital trial. The Oklahoma Court of Criminal Appeals, in affirming the denial of psychiatric assistance, read Ake as limited to cases in which the sole defense to the charge is insanity. Such a restrictive interpretation of Ake is directly contrary to the holding in that case, which applies to future dangerousness. Furthermore, the state unfairly capitalized on the absence of psychiatric testimony by arguing that Johnson was "not supported by any medical testimony of any kind." That argument by the state demonstrates more forcefully than the citation of any authority the violation of due process in failing to provide funds for psychiatric experts.

The second question concerns an issue reserved in Caldwell: Does Ake require the appointment of a non-psychiatric expert to assist the defense. In this case the only direct evidence linking Johnson to the crime was the testimony of a chemist employed by the state to examine blood, hair and fiber samples. The prosecution called the

chemist's testimony the "real crux" of the case and labelled it "damning", "condemning", and "conclusive". The trial court denied a request for appointment of a defense chemist even though it believed that one was necessary and that the right to inspect the state's physical evidence was "useless" without an expert to examine it.

The third question returns to an issue addressed by this Court in Brown. Brown involved a no-sympathy charge that was limited by the adjective "mere". The charge in this case was not so limited. It implied that all sympathy whether or not tethered to the mitigation evidence was arbitrary and should not influence the jurors' deliberations. Furthermore, the prosecution ridiculed the mitigation evidence offered by the defense. Coming as it did after the court's instructions, the prosecution's misleading comments on mitigation were the last words on the meaning of mitigation heard by the jury.

POINT I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AKE V. OKLAHOMA REQUIRES THE APPOINTMENT OF A DEFENSE PSYCHIATRIST TO REBUT THE STATE'S EVIDENCE OF FUTURE DANGEROUSNESS

In Ake v. Oklahoma, 470 U.S. 68 (1985), this Court unambiguously held that the constitution compels a state to provide a defendant with access to psychiatric assistance "when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U.S. at 83. The Court noted both the value of psychiatric testimony in resolving this issue and the dangers apparent in its absence. Id. at 83-84.

Ake is not the first decision in which this Court has cited the importance of psychiatric testimony. This Court has consistently recognized the relevance of such testimony, particularly in determining future dangerousness. Barefoot v. Estelle, 463 U.S. 880, 896-905 (1983); see Estelle v. Smith, 451 U.S. 454, 473 (1981). In Ake the Court described in some detail the critical importance of psychiatric assistance to the defense:

> psychiatrists gather facts, both through professional examination, interviews and elsewhere, that they will share with the judge or jury; they analyze the information gathered about the defendant's mental condition, and about the effects of any disorder on behavior, and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity. ... Through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Ake v. Oklahoma, 470 U.S. at 80-81. This reasoning compelled the Court to hold that the constitution required appointment of a defense psychiatrist when the issue was not one of sanity but of future dangerousness. See Ake v. Oklahoma, 470 U.S. at 83.

A psychiatrist, by benefit of training and experience, is uniquely qualified to assist lay jurors in interpreting the raw data that the state offers to support its allegation of future violent conduct. Psychiatric testimony can guide and inform the jurors' discretion by placing the defendant's behavior in the context of his mental condition,

medical history, and upbringing. A psychiatrist can help to blunt the jurors' emotional reaction to the state's evidence -- which almost always consists of prior bad acts -- and can provide a principled reason to return a sentence less than death.

For example, a psychiatrist can opine as to the potential of the defendant to form a therapeutic alliance and through time to become rehabilitated. Testimony concerning the defendant's ability, as part of a therapeutic program, to reform is a necessary consideration in determining future dangerousness. Indeed it may be the only evidence that a defendant can offer to rebut an allegation of future dangerousness -- particularly when the state's evidence consists of prior bad acts. Without it, the defense may be bereft of any evidence to support a sentence less than death. See id. at 81.

Although the Ake Court discussed its holding in a case where the state first offered psychiatric testimony, nothing in the opinion, however, supports the conclusion that the right to psychiatric assistance is limited to instances where the state first presents expert testimony on this issue. Indeed, the opposite conclusion must be drawn. The reason articulated for the holding, that a defense psychiatrist can help to raise doubts in the jurors' minds about the state's proof of an aggravating factor, is no less compelling when the state fails to offer any expert testimony at all and relies instead on the unguided speculation of lay witnesses and jurors. As noted above, psychiatric testimony may be the defense's only evidence on the question of future dangerousness. (The contrary result could lead to

the state's frustration of the right to psychiatric assistance by relying solely on prior bad acts and avoiding psychiatric testimony.) The right to an effective defense has not been founded on the flimsy reasoning of tit for tat. See Jurek v. Texas, 428 U.S. 262, 274-76 (1976) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine").

The state in this case made much of the personal opinion of the two prosecutors that Johnson would be likely to engage in future assaultive conduct. Yet it presented no psychiatric testimony on that issue. It relied solely on evidence of Johnson's prior criminal conduct and the speculation of the lay jurors.

Having successfully opposed Johnson's request for funds to retain a psychiatrist and for funds to investigate, the state proceeded to attack him both for not supporting his case in mitigation and for not rebutting the state's evidence of future dangerousness. The prosecution argued that there was "not a scintilla of evidence" to support Johnson's claim that he could not conform his conduct to the requirements of law as a consequence of mental disease or intoxication. (Trial of the Second Stage, March 23, 1982, at 206.) As to Johnson's claim that he would not constitute a threat to society if he were confined under close supervision, the prosecution argued: "Did you hear any evidence about that? This is a figment of his lawyer's imagination."* (Id. at 210.)

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* The trial judge sustained an objection to this personal remark about counsel and admonished the jury to disregard it. (Id.)

Finally, the prosecution made two egregious arguments that directly and unambiguously referred to the absence of medical testimony. Responding to Johnson's claim that his turbulent upbringing could explain his conduct, the prosecution argued to the jury: "There's no evidence to help you corroborate the meaning of that in any way." (Id. at 212.) Responding to the claim that Johnson's childhood illness adversely affected his mental ability: "Did you hear any evidence about that? . . . He's not supported by any medical testimony of any kind". (Id. at 211 (emphasis added).) Of course he wasn't supported by any medical testimony, the state had denied him funds to retain a psychiatrist. Not surprisingly, in view of the absence of supporting psychiatric testimony, the jury returned a verdict that the state had proven future dangerousness.

In its opinion affirming Johnson's conviction and sentence, the Court of Criminal Appeals recognized that Johnson had properly preserved and raised on appeal the trial court's denial of funds "for the employment of a psychiatrist to explore the possibility of mitigating evidence." The court's opinion, however, appeared to limit the holding in Ake to cases where a psychiatrist is needed "to explore and present his only defense of insanity." That limitation on Ake is completely contrary to this Court's holding.*

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* It is, however, completely consistent with the persistent failure of Oklahoma courts to apply Ake to cases of future dangerousness. See, e.g., Oklahoma v. Hatch, No's CRF-79-302, 303, 304, 305 (motion for psychiatric assistance on mitigation and future dangerousness denied).

Certiorari should be granted to determine whether Ake requires the appointment of a psychiatrist to assist the defense when the state seeks to prove as an aggravating factor at the penalty phase the defendant's future dangerousness.

POINT II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN INDIGENT DEFENDANT IS ENTITLED TO FUNDS TO RETAIN AN EXPERT TO REBUT TESTIMONY BY THE STATE'S EXPERT ON THE CRITICAL ISSUE OF THE IDENTITY OF THE ASSAILANT

In Caldwell v. Mississippi, 472 U.S. 320 (1985) this Court explicitly declined to consider whether as a matter of federal constitutional law a defendant is entitled to the appointment of a non-psychiatric expert witness to assist the defense.* 472 U.S. at 323 n. 1. Such a holding, however, is logically compelled by a long line of authority, culminating in Ake, that a "criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." Ake v. Oklahoma, 470 U.S. at 77. Indeed in Moore v. Kemp, 809 F.2d 702, 709-13, 735, 741-42 (11th Cir. 1987), the en banc Eleventh Circuit accepted the petitioner's argument that Ake

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* In Caldwell discussion of the issue was pretermitted because the defendant had "offered little more than undeveloped assertions that the requested assistance would be beneficial...." 472 U.S. at 323 n. 1. Johnson's claim does not suffer from the same defect. As shown above, Johnson's motion made a particularized showing of need for the assistance of a forensic chemist who was an expert in electrophoresis.

required the appointment of non-psychiatric expert assistance upon a sufficient showing of need.* The decision below is in direct and irreconciliable conflict with Moore and implicit conflict with Ake and Caldwell.

On January 28, 1982, counsel moved for appointment of a psychiatrist, parole and probation expert, sociologist and expert on the death penalty, and a chemist to analyze the state's physical evidence. He demonstrated that an expert would be of assistance to the defense by informing the trial judge of the nature of the state's case, describing the state's evidence linking him to the crime (carefully explaining that the case was based solely on circumstantial evidence), specifically describing the proposed expert's qualifications, and informing the court precisely why this particular kind of expert was necessary. The trial judge agreed that an expert was necessary but denied the motion on the ground that funds for experts were not authorized by Oklahoma law.

In summation, the prosecution repeatedly hammered home to the jury the critical importance of the testimony of the state's expert. According to the prosecutor, the expert's testimony on serology was the "real crux" of the case and narrowed the odds of Johnson being the assailant. Indeed, the prosecution forcefully argued that Joyce Gilchrist's

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* The defendant in Moore was denied relief because he had failed to make the required showing of need -- a majority of the judges, however, including those who would not agree to accept that Ake applied to non-psychiatric experts, concluded that the petitioner probably had shown that expert assistance would have aided his defense.

"testimony firmly erased any reasonable doubt, any doubt at all in this case."

. . .

"[H]er evidence is damming, its condemning, its conclusive."

(Transcript of Proceedings, Mar. 22, 1982 at 1228-29.) One of the two prosecutors also offered his personal testimonial that "She's good and she's thorough." (Id. at 1228.) Of course, the defense had been denied funds to retain an expert to challenge her credentials, methodology or opinions.*

This Court has previously recognized the importance of blood grouping tests in Little v. Streater, 452 U.S. 1 (1981). In that case, this Court held in a unanimous opinion that the due process and equal protection clauses are violated if an indigent defendant in a paternity suit is denied funds to obtain such tests. This Court found that failure to provide funds denied him access to reliable scientific proof in his defense.

In this capital case the testimony of an opposing expert, and the assistance of that expert in preparing the cross-examination of the state's expert, was critical to Johnson's ability to present an adequate defense. The forensic chemist's testimony was the only direct evidence placing Johnson in Ms. Thompson's apartment. Here, whether the samples taken from the apartment were consistent with samples taken from Johnson was a critical issue and a sig-

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* In his petition for rehearing before the court of criminal appeals, counsel submitted a letter from a forensic chemist to an association of forensic scientists challenging Ms. Gilchrist's credentials and opinions and urging an immediate investigation into her expert testimony in a number of cases. (A copy of the letter is attached hereto as Exhibit B.)

nificant factor in resolution of the case. The only means by which Johnson could have defended against the expert testimony offered by the state was to offer expert testimony of his own. The trial court recognized that access to the physical samples was "useless" without an expert. (Transcript Of Proceedings, Jan. 28, 1982 at 20.) Fundamental fairness is violated when a criminal defendant on trial for his life is denied an expert to examine a piece of critical evidence whose nature is subject to varying expert opinion.*

In rejecting his claim for an expert, the Oklahoma Court of Criminal Appeals held that (i) Johnson "did not demonstrate to the trial court that the tests or results were seriously in question", and (ii) "the risk of inaccurate resolutions from the scientific tests involved such that due process of law is threatened if a defendant is denied access to independent experts."** The court's first justification for its ruling is a Catch-22 that only Yossarian could fully appreciate: To justify appointment of an expert to rebut the state's evidence, the defendant must first rebut the evidence -- presumably with an expert. Its second justification would appeal only to the Queen of Hearts in Wonderland: the risk of inaccurate scientific tests by a state expert is to be borne by the indigent defendant.

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* In Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975), the court, in a non-capital case, held that due process was violated when a state denied the defendant the right to have a ballistics expert inspect the murder weapon and bullet. 514 F.2d at 746. That right is of no value if the defendant is indigent and cannot effectively exercise it.

** The court relied, in part, on the panel opinion in Moore v. Zant, 772 F.2d 640 (11th Cir. 1983), which was superseded by the en banc opinion.

The court, for obvious good reason, does not even attempt to suggest how a incarcerated, indigent, uneducated defendant could perform the sophisticated scientific analysis that, under its holding, would be a precondition to obtaining funds to retain an expert. Nor does it cite the authority that supports its view that the due process clause is not offended if the defendant lacks funds to challenge inaccurate evidence offered by the state -- evidence labelled by the prosecution as "condemning" and "conclusive".

Accordingly, it is exceptionally important that this Court decide whether Ake and Caldwell extend to non-psychiatric witnesses.

POINT III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION LEFT OPEN IN CALIFORNIA V. BROWN: WHETHER ARGUMENT BY THE PROSECUTOR RIDICULING MITIGATING EVIDENCE AND A NO-SYMPATHY CHARGE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

This case squarely presents two issues left unresolved in California v. Brown, __ U.S. __, 107 S. Ct. 837 (1987): (i) Whether a no-sympathy charge not modified by inclusion of the adjective "mere" violates the eighth and fourteenth amendments, and (ii) Whether a no-sympathy charge considered in combination with a prosecutor's argument ridiculing mitigating evidence about a defendant's turbulent background violates the eighth and fourteenth amendments.

In Brown four justices joined an opinion by the Chief Justice finding that a no-sympathy instruction did not violate the eighth and fourteenth amendments. That charge informed the jurors that they "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public

opinion or public feeling.'" __ U.S. at __, 107 S. Ct. at 843 (emphasis added). The Chief Justice deemed the inclusion of the adjective "mere" to be dispositive because that word ensured that rational jurors would understand the charge to exclude from their consideration only sympathy that was not tethered to the penalty phase evidence. 107 S. Ct. at 840.

Justice O'Connor concurred in a separate opinion, stressing that her concurrence depended on the understanding that, on remand, the California Supreme Court would determine whether the jury instructions as a whole "and considered in combination with the prosecutor's closing argument" adequately informed the jurors of their obligation to weigh all of the mitigating evidence. Justice O'Connor also associated herself with the view of the four dissenters that no-sympathy instructions in general pose a danger of misleading jurors "into believing that mitigating evidence about a defendant's background or character ... must be ignored." __ U.S. at __, 107 S. Ct. at 841-42.

In this case, the trial judge charged the jury prior to closing argument that

> you should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence.

Counsel objected, arguing

> The jury can get confused by this language.
>
> What is sympathy? Sympathy may be concern for a 'defendant's] family, which can be a mitigating circumstance. . . We believe that that instruction limits mitigating circumstances in violation of Lockett & Ohio, and in violation of Eddings v. Oklahoma.

> Secondly, we contend that when you state you should avoid any influence of passion, prejudice or other arbitrary factors when imposing sentence[], [it] could lead the jury to feel that something is mitigating-but also arbitrary and therefore, disregard that particular fact, also in violation of Lockett v. Ohio and Eddings v. Oklahoma. We believe that that particular sentence limits mitigation and therefore violates the 8th and 14th Amendments to the United States Constitution.

(Hearing on Penalty Phase Jury Instructions, March 23, 1982, at 5-6.)

After the instructions the prosecution began an assault on both counsel* and the mitigating evidence -- evidence that this Court has consistently held to be mitigating:

> "I've got great empathy for his folks. But so what?"
>
> . . .
>
> "[H]is parents divorced when he was young. Oh, wow."
>
> . . .
>
> "That's a mitigating factor for violent conduct. That's bologna."
>
> . . .
>
> "Deprivation builds character. We ought to have fewer silver spoons in the mouths of our children and a little more deprivation. He wants to use that as a mitigating circumstance."
>
> . . .
>
> "I was offended by what happened in this courtroom when the little children were placed on that witness stand to try to generate sympathy for a cold-blooded killer."
>
> . . .
>
> "So what if he was sick or retarded: What's that got to do with -- we're dealing with what he

* E.g., "I thought it was interesting when counsel was up here crying for Malcolm Johnson."

> is today .... Not whether he had a disease when he was a baby, not whether he was mildly retarded at some time in his life."

The argument that Brown invalidates Johnson's sentence of death is brief but compelling. On every scale deemed dispositive or even relevant by the Court, Johnson should prevail in his challenge to the no-sympathy charge at the penalty phase. First, the instruction in this case did not contain the modifier "mere", identified as crucial by the Chief Justice. As opposed to the jury in Brown, Johnson's jurors were not informed that they should only disregard emotion with no foundation in the evidence. Second, the charge in this case implied that all sympathy -- even that which arose from the evidence -- was an arbitrary factor. Finally, the comments of the two prosecutors virtually ensured that Johnson's jurors would interpret the no-sympathy instruction as effectively barring consideration of his case in mitigation.

Certiorari should be granted to consider whether Johnson's no-sympathy charge, which failed to contain any modifying language, either alone or in combination with the prosecution's argument, warrant reversal.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: New York, New York
April 28, 1987

Respectfully submitted,

Thomas M. Lahiff, Jr.

THOMAS M. LAHIFF, JR.

919 Third Avenue
46th Floor
New York, New York
(212) 735-2152

ATTORNEY OF RECORD FOR
PETITIONER

3298312

PUBLIC DEFENDER
ROBERT A. RAVITZ
409 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73102

...LS OF THE STATE OF OKLAHOMA

MALCOLM RENT JOHNSON,	)	
Petitioner,	)	
-vs-	)	No. F-82-312
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

FEB 00 1987
JAMES H. PATTERSON
CLERK

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

NOW on this 9th day of February, 1987, having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 9th day of February, 1987.

TOM BRETT, PRESIDING JUDGE

REZ J. BUSSEY, JUDGE

ATTEST:

Clerk

Appendix M to Rehearing

REGIONAL CRIMINALISTICS LABORATORY

Kansas City Region

816—221-1503

1528 HOLMES

KANSAS CITY, MISSOURI 64108-1535

January 5, 1987

Pauline Louie, President
Southwestern Association of Forensic Scientists
Houston Police Department
33 Artesian St.
Houston, Texas 77002

Dear Ms. Louie:

I am writing in regards to a serious situation existing in the forensic science community of which I initially became aware in 1985. I was asked by several different criminal defense lawyers in the Oklahoma City area to review the casework on a number of homicides in which a Joyce A. Gilchrist of the Oklahoma City Police Department had participated. After being told of what Ms. Gilchrists' testimony was going to indicate, I asked to review the preliminary hearing transcripts. I found statements made by Ms. Gilchrist in those transcripts to be appalling. I then proceeded to re-examine several items of evidence, primarily hair, on different cases.

After 13 years experience as a forensic chemist I certainly understand varying levels of training, education and experience. I can understand different examiners arriving at varying conclusions with the same evidence, especially with hair comparison evidence which is somewhat subjective in nature. I do not agree with all of Ms. Gilchrists positive comparisons. What has occured here is beyond the realm of mere differences between examiners. Ms. Gilchrist is at odds with the entire forensic science community in my opinion.

Recently I have received a number of transcripts in which Ms. Gilchrist has testified. A copy of each of the official court transcripts I refer to is enclosed. (1, 5, 8, 15, 26) The following is a compilation of merely a few of the inaccurate statements that reflect upon both Ms. Gilchrists competence and ethics that are present throughout the enclosed transcripts.

> Ms. Gilchrist testifies that she is a member of the American Academy of Forensic Science. (9, 16, 27) She is not now and was not in 1985 or 1986 when she testified.
>
> Ms. Gilchrist testifies that she has never seen hairs from two different people match, and states she knows of no one else who has either. (10, 14, 20, 23, 33) All forensic literature contradicts such a statement.
>
> Ms. Gilchrist testifies that hair must be pulled apparently because its not cut. (7, 11, 19, 32) She obviously does not recognize natural breakage in hair as is common in Negroid hair.

Ms. Gilchrist testifies that the rate of natural hair fall is not known and cannot be estimated. (18) The literature is replete with examples of such determinations.

Ms. Gilchrist provides an opinion that a stain is blood on the basis of a presumptive test even though several confirmatory tests are negative. (2)

She testifies that Barry Gaudette is the father of Forensic Science (22); that she is comfortable comparing hair fragments only 3 mm in length (13) and that 160 magnifications is the least magnification used on a hair comparison (17).

In serology Ms. Gilchrist has indicated that she can apparently determine PGM types from saliva on a toothpick (16) and perhaps even additional groups (3).

On the basis of an ABO group A identified in a seminal stain, Ms. Gilchrist testifies that only 26% of the white population is group A then divides that by 2 and states that the resulting 13% is the percentage of the white population that could contribute the stain. (35) Obviously something over 40% of the population, regardless of the group considered, is more accurate.

She testifies that seeing EsD activity in a semen sample means there is not enough semen present to determine a blood group (24) and she identifies an EsD type in a semen sample (28).

She can tell when two people have provided a seminal fluid sample due to the number of the stains present. (31)

Ms. Gilchrist testifies that she can identify blood through observation of a photograph (30) or simply looking at a red stain. (29)

The above egregious testimony by Ms. Gilchrist is difficult to accept of any professional, however, in the following shocking examples Ms. Gilchrist persists in rendering scientific opinions from the witness stand which in effect positively identifies the defendant based on the slightest bit of circumstantial evidence.

In the Parker trial Ms. Gilchrists opinion is that the defendant was in close contact with the victim. (12) This apparently is based on hair fragment comparisons, some as small as 3 mm in length.

In the Ables trial Ms. Gilchrists opinion is that the defendant was in very close and possible violent contact with the victim (21) based again apparently on broken hair fragments.

In the McCarty trial Ms. Gilchrists opinion was that the defendant was in fact there (34) when asked by the prosecutor if the defendant was physically present during the time the violence was done to the victim.

In the Stouffer trial Ms. Gilchrists opinion was that blood on gun in fact did come from the victim (4) apparently on the basis of an ABO group A and a PGM type 1 (over 20% of the Caucasian population).

Such testimony to a jury from an expert is obviously designed to be devastating. Ms. Gilchrist apparently makes such statements casually and routinely without regard to her professional responsibilities.

Ms. Gilchrist states that she is entitled to her own opinion. When that opinion is stated to a jury I disagree. As an expert witness Ms. Gilchrist has a professional responsibility to uphold. A personal opinion has no place in the testimony of an expert. That expert opinion should be objective and based upon the scientific findings of an examination and within the current capabilities of the profession.

Ms. Gilchrist acknowledges that a person cannot be identified through a particular type of exam and then defies logic by proceeding to render a scientific opinion identifying that person. Apparently Ms. Gilchrist believes that by adding the word "opinion" she can make any statement, regardless of how preposterous, without explaining how she arrives at such an opinion. If the transcripts are read in their entirety it becomes clear that the preposterous convoluted explanations by Ms. Gilchrist are made to "justify" the opinions which she offers.

Ms. Gilchrist misrepresents factual data upon which all forensic scientists base their exams and conclusions.

Ms. Gilchrist expresses opinions that are not justified by the results of examination and is in essence "cheating" when she does so. When a forensic scientist accepts a professional standard to maintain professional competency, expert testimony without such makes that testimony unethical.

After having testified in the Parker trial in which I contradicted some of Ms. Gilchrists testimony she apparently felt it necessary to testify in two following trials (15, 26) that I had "tampered" with evidence, apparently on the basis that a slide or coverslip was cracked. This is an obvious absurdity. No explanation is given as to how a broken slide (apparently broken in transport) constitutes tampering. This is merely additional unethical testimony by Ms. Gilchrist in an attempt to negate her incompetence.

Utilizing the code of ethics of the Southwestern Association of Forensic Scientists approved at the Fall 1985 meeting in Houston, Texas (36), I specifically charge Ms. Gilchrist with undertaking examinations and giving testimony in which she is not thoroughly qualified in violation of guideline 2 of the code. Further, I charge Ms. Gilchrist with making statements pertaining to the results and conclusions of her examination which are not objective in nature nor in keeping the current capabilities of forensic science in mind in contradiction to guideline 4.

This situation is obviously not going to cure itself - the situation has apparently existed for a number of years, it persists and is condoned by much of the criminal justice system in Oklahoma County. An individual commands little attention in correcting a problem of such magnitude. I urge your

association to review this situation and take the appropriate steps as outlined by your association.

Respectfully submitted,

John T. Wilson
Chief Forensic Chemist
Regional Crime Lab

JTW:rb

- - REFERENCES - -

1) State of Oklahoma vs. Bigler Jobe Stouffer II.
CRF-85-509. District Court of Oklahoma official transcript copy.
Pages 704 through 735.

2) ibid. Page 715, line 23 through page 717, line 21.

3) ibid. Page 712, line 16 through page 713, line 5.

4) ibid. Page 718, line 24.

5) State of Oklahoma vs. Alvin Parker .
CRF-85-698. Oklahoma County official court transcript
Preliminary Hearing. Pages 107 through 128.

6) ibid. Page 114, line 23.

7) ibid. Page 118, line 10.

8) State of Oklahoma vs. Alvin Parker.
CRF-85-698. District Court of Oklahoma official transcript copy.
Pages 430 through 517.

9) ibid. Page 432, line 16.

10) ibid. Page 452, line 2.

11) ibid. Page 453, line 15 through page 454.

12) ibid. Page 462, line 18.

13) ibid. Page 478, line 25.

14) ibid. Page 480, line 15.

15) State of Oklahoma vs. James Lucas Abels, Jr.
CRF-85-5357. District Court of Oklahoma official transcript copy.
Pages 424 through 461.

16) ibid. Page 426, line 19.

17) ibid. Page 431, line 16.

18) ibid. Page 446, line 20.

19) ibid. Page 441, line 14.

20) ibid. Page 447, line 17.

21) ibid. Page 448, line 1.

22) ibid. Page 459, line 22.

23) ibid. Page 460, line 6.

24) ibid. Page 570.

25) ibid. Page 575.

26) State of Oklahoma vs. Curtis Edward McCarty.
CRF-85-02637. District Court of Oklahoma official transcript copy.
Pages 22 through 219.

27) ibid. Page 25, line 13.

28) ibid. Page 61, line 18.

29) ibid. Page 104, line 15.

30) ibid. Page 105, line 15.

31) ibid. Page 107, line 12 through page 108, line 4.

32) ibid. Page 149, line 7.

33) ibid. Page 160, line 17.

34) ibid. Page 176, line 21.

35) ibid. Page 199, line 18 through 200, line 13.

36) Memorandum. Southwest Association of Forensic Scientist Code of Ethics.
June 17, 1985, revised 8-26-85. 6 pages.

your children ride with a driver that was exhibiting that conduct? I think that there can be but one verdict in this case. (Tr. 163).

Defense counsel interposed a timely objection to this remark and the trial court admonished the jury concerning the comment by stating:

> Ladies and gentlemen, we are simply evaluating what happened, and if you find that a crime was committed, then you can determine what that crime was and decide what the punishment was—should be. That will be your job. (Tr. 164)

The appellant argues that this admonishment was ineffective, in that, the trial judge failed to specifically instruct the jury to disregard the remark. However, trial counsel failed to request an admonishment and further failed to request the trial court to make the admonition more specific. Moreover, notwithstanding the fact that the admonition could have more specifically instructed the jury to disregard the comment, we are of the opinion that the admonishment given cured the error, if any, that resulted from the comments. This assignment of error is meritless.

[2] As his final assignment of error, the appellant contends that he was denied the effective assistance of counsel due to trial counsel's failure to object to testimony concerning the attempt to administer the breathalyzer test, and his failure to question the police officers concerning whether the breathalyzer machine was adequately and properly maintained. We reject this contention.

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984), the United States Supreme Court held that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

After a careful review of these factors in light of the circumstances of the instant case, we are of the opinion that counsel's conduct did not so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* This assignment of error is without merit.

For the above and foregoing reasons, the judgment and sentence is AFFIRMED.

BRETT, P.J., and PARKS, J., concur.

KEY NUMBER SYSTEM

Malcolm Rent JOHNSON, Appellant,

v.

STATE of Oklahoma, Appellee.

No. F-82-312.

Court of Criminal Appeals of Oklahoma.

Jan. 16, 1987.

Rehearing Denied Feb. 9, 1987.

Defendant was convicted in the District Court of Oklahoma County, William S. Myers, Jr., J., of first-degree murder and was sentenced to death, and he appealed. The Court of Criminal Appeals, Bussey, J., held that: (1) reasons offered by prosecutor overcame prima facie case of purpose-

ful discrimination in selection of jury; (2) statutory exclusion of persons over 70 years of age from venire was not established to be prima facie violation of Sixth Amendment right to representative jury; (3) defendant's woman friend could consent to search of apartment which they shared; (4) interrogating officers were not required to advise defendant that his statements could lead to imposition of death penalty; (5) infliction of death penalty for felony-murders did not violate Eighth Amendment; (6) jury instructions were proper; (7) jury did not spend unreasonable length of time deliberating during sentencing stage so as to require trial judge to take case from jury and impose sentence of life imprisonment; (8) denial of pretrial request for funds to explore and prove defense using expert witnesses did not violate principles of due process; and (9) death sentence was not shown to be imposed in discriminatory manner.

Affirmed.

1. Jury ⇐108

Excluded veniremen had views concerning death penalty which would substantially impair their abilities to serve as jurors in case and, thus, they were properly excluded.

2. Jury ⇐33(5.1)

Defendant, attempting to establish prima facie case of purposeful discrimination in selection of petit jury, must demonstrate that he is member of cognizable racial group and that prosecutor exercised peremptory challenges to remove from venire members of that race, may rely on fact that prosecutor can use peremptories as tool with which to discriminate, and must demonstrate that facts and other relevant circumstances raised inference that prosecutor used practice to discriminate against defendant.

3. Jury ⇐120

Prosecutor has burden to offer neutral explanation for challenging black jurors, once prima facie case of purposeful discrimination in selection of petit jury is made.

4. Jury ⇐121

Prosecutor, in reconstructing from record, his memory, and from his own policies his reasoning in removing particular jurors, offered sufficiently neutral and logical explanation for using peremptory challenges to exclude last three black venirepersons from panel and, thus, defendant's rights under Sixth Amendment were not violated. U.S.C.A. Const.Amend. 6.

5. Jury ⇐120

Explanation for using peremptory challenges to exclude members of racial group from jury, so as to overcome prima facie case of discrimination, does not have to rise to level of challenge for cause.

6. Jury ⇐33(2.1)

Excusal of venirepersons who had views concerning death penalty which would substantially impair their ability to serve as jurors did not violate Sixth Amendment right to representative jury; such right did not include right to be tried by jurors who explicitly indicated inability to follow law and instructions of trial judge. U.S.C.A. Const.Amend. 6.

7. Jury ⇐33(1.1)

It must be shown that group alleged to be excluded from jury is distinctive group in community, that representation of that group in venires from which juries are selected is not fair and reasonable in relation to number of such persons in community, and that underrepresentation is due to systematic exclusion of that group in jury selection process, in order to establish prima facie violation of Sixth Amendment right to representative jury. U.S.C.A. Const.Amend. 6.

8. Jury ⇐33(1.4)

Defendant failed to establish prima facie violation of Sixth Amendment right to representative jury as result of statutory exclusion of persons over 70 from venire, where defendant consented to determination of motion to quash jury panel on basis of bare stipulation by State that some of those aged 70 and older s
duty would claim stat
U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐1181.

There was no reaso
for evidentiary hearing or
lenge to statutory excl
over 70 from jury duty
Amendment right to re
where defense counsel m
offer necessary proof t
facie case; there was no
that such proof existe
Court of Criminal Appe
O.S.A. Ch. 18, App.; U.S.C
6.

10. Constitutional Law

Suppression of evide
spite defense request is
cess, irrespective of goo
prosecutor, where evide
guilt or punishment, in t
affected outcome of trial.
Amend. 14.

11. Constitutional Law

Names of defendan
district attorney during
for raping women 55 y
older, names of suspect
prior to arrest of defend
tion involving any unsolv
en 55 years of age or
location were not materia
ishment in capital murde
suppression of such evide
not denial of due process.
Amend. 14.

12. Searches and Seizur

Consent of defendan
justified warrantless sea
where woman friend wa
apartment, and had at le
use and occupation th
Const.Amend. 4.

13. Criminal Law ⇐414

Defendant who soug
his statement based on d
appearance before magis

those aged 70 and older summoned for jury duty would claim statutory exemption. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐1181.5(3)

There was no reason to remand case for evidentiary hearing on defendant's challenge to statutory exclusion of persons over 70 from jury duty as violating Sixth Amendment right to representative jury, where defense counsel made no attempt to offer necessary proof to establish prima facie case; there was no reason to assume that such proof existed at late stage. Court of Criminal Appeals Rule 3.11, 22 O.S.A. Ch. 18, App.; U.S.C.A. Const.Amend. 6.

10. Constitutional Law ⇐268(5)

Suppression of evidence by State despite defense request is denial of due process, irrespective of good or bad faith of prosecutor, where evidence is material to guilt or punishment, in that it would have affected outcome of trial. U.S.C.A. Const. Amend. 14.

11. Constitutional Law ⇐268(5)

Names of defendants prosecuted by district attorney during 18-month period for raping women 55 years of age and older, names of suspects in case at bar prior to arrest of defendant, and information involving any unsolved rapes of women 55 years of age or older in specific location were not material to guilt or punishment in capital murder case and, thus, suppression of such evidence by State was not denial of due process. U.S.C.A. Const. Amend. 14.

12. Searches and Seizures ⇐177

Consent of defendant's woman friend justified warrantless search of apartment, where woman friend was actual lessee of apartment, and had at least equal right to use and occupation thereof. U.S.C.A. Const.Amend. 4.

13. Criminal Law ⇐414

Defendant who sought suppression of his statement based on delay in his initial appearance before magistrate had burden to show that he was prejudiced by delay in his initial appearance. 22 O.S.1981, § 182.

14. Criminal Law ⇐412.1(3)

Fact that statements were taken from defendant prior to his initial appearance did not establish necessary prejudice to defendant as result of delay in initial appearance so as to warrant suppression of the statements. 22 O.S.1981, § 182.

15. Criminal Law ⇐412.2(3)

Interrogating officers were not required to advise defendant that his statements could lead to imposition of death penalty, in addition to what was required under *Miranda*. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐1168(2)

Any error in permitting evidence of aggravation to be heard in first stage of capital murder trial in form of medical examiner's testifying that one experiencing terror of being unable to breathe would be under "some great mental anguish and apprehension" was harmless, in that verdict would have been same and evidence would have been admissible in sentencing stage.

17. Criminal Law ⇐1213.8(8)

Infliction of death penalty for felony-murder in absence of finding that defendant killed with premeditation or malice aforethought was not in violation of Eighth Amendment prohibition against cruel and unusual punishment; proscribing such conduct under first-degree felony-murder statute performed rational function of deterring commission of felonies so inherently dangerous as to create foreseeable risks of death. U.S.C.A. Const.Amend. 8.

18. Homicide ⇐354

Document representing defendant's Illinois conviction for burglary of dwelling was admissible in penalty phase of capital murder prosecution in support of aggravating circumstance relied upon by State that there was probability that defendant would commit criminal acts of violence of continuing threat to society. 21 O.S.1981, § 701.12, subd. 7.

19. Homicide ⇐354

Evidence of other unadjudicated rapes committed by defendant, concerning which criminal charges were pending, were admissible in second stage of capital murder prosecution in support of aggravating circumstance relied upon by State that there was probability that defendant would commit criminal acts of violence of continuing threat to society. 21 O.S.1981, § 701.12, subd. 7.

20. Criminal Law ⇐829(22)

Defendant in capital murder prosecution was not entitled to instruction that jury had right to sentence defendant to life imprisonment even if it found aggravating circumstances were not outweighed by mitigating circumstances, in that proposed instruction was subsumed by instruction that if jury found one or more aggravating circumstances it could consider imposing death penalty; jury was not instructed that it was required to assess death if aggravating circumstances were found which were not outweighed by mitigating circumstances.

21. Homicide ⇐311

Trial judge, in capital murder prosecution, could properly instruct jury not to allow sympathy, sentiment or prejudice to affect it in reaching its decision; declining to follow *People v. Easley*, 34 Cal.3d 858, 196 Cal.Rptr. 309, 671 P.2d 813.

22. Homicide ⇐354

Defendant in capital murder prosecution was not entitled to notice of evidence relevant to sentencing which had been introduced in first stage of trial; defendant was only entitled to notice of evidence relevant to sentencing which would be introduced for first time in sentencing hearing. 21 O.S.1981, § 701.10.

23. Homicide ⇐354

State did not have burden, in capital murder prosecution, of proving beyond reasonable doubt that aggravating circumstances outweighed mitigating. 21 O.S. 1981, § 701.11.

24. Homicide ⇐311

Defendant in capital murder prosecution was not entitled to have jury instructed that if unanimous decision as to punishment could not be reached, judge would impose sentence of life imprisonment; instruction would amount to invitation to jury to avoid difficult duty of passing sentence upon life of accused. 21 O.S.1981, § 701.11.

25. Criminal Law ⇐865(2)

Jury deliberation of three hours and 35 minutes in sentencing stage of capital murder prosecution was not unreasonable and, thus, trial judge was not required to take case from jury and impose sentence of life imprisonment, given task of considering 26 mitigating and three aggravating circumstances with which jury was faced. 21 O.S.1981, § 701.11.

26. Criminal Law ⇐1206.1(2)

Death penalty statutes were not unconstitutional due to failure of State to demonstrate that death penalty fulfilled compelling state interest which could not be gratified by less drastic means; rejecting *Commonwealth v. O'Neal*, 369 Mass. 242, 339 N.E.2d 676.

27. Constitutional Law ⇐268(10)

Due process of law may require that State provide indigent defendant access to expert witness. U.S.C.A. Const.Amend. 14.

28. Constitutional Law ⇐268.2(2)

Assertion that young man who would sexually assault and slay elderly woman was not sane did not amount to showing that defendant's sanity at time of offense would be significant factor at trial and, without more, failure of State to provide defendant access to psychiatrist in capital murder prosecution did not amount to denial of due process. U.S.C.A. Const.Amend. 14.

29. Constitutional Law ⇐268(10)

Failure of State to provide defendant with forensic chemist to contest State's scientific evidence in capital murder prosecution, with respect to evidence of blood type and presence of antigen in blood and semen found on victim, her clothin
tests for presence of sperm
sons between hairs and f
crime scene and those rem
fendant and his clothing,
principles of due process,
stration that tests or results
in question or that expert
U.S.C.A. Const.Amend. 14.

30. Constitutional Law ⇐

Defense counsel faile
need for investigative fund
to journey to Illinois to int
witnesses for capital murc
value of investigation to t
lack of alternative devices
functions were not discern
of such funds did not viol
due process. U.S.C.A. C

31. Criminal Law ⇐1206.

Death penalty statute
constitutional due to their
vide, by their terms, a
funds to allow indigent de
sue and present mitigatin
O.S.1981, § 701.11.

32. Homicide ⇐354

Fact that defense c
heard of imposition of
against black defendant fo
black person did not esta
penalty statutes resulted
capricious sentencing and
in discriminatory manner,
capital murder prosecution
defendant and white victi
gravating circumstances
by evidence, and jury wa
by passion, prejudice, or
trary factor in imposing d
O.S.1981, § 701.11, 21
701.13.

An appeal from the I
Oklahoma County; Willia
District Judge.

1. The voir dire of juror M
the following:

found on victim, her clothing and bedding, tests for presence of sperm, and comparisons between hairs and fibers found at crime scene and those removed from defendant and his clothing, did not violate principles of due process, absent demonstration that tests or results were seriously in question or that experts were biased. U.S.C.A. Const.Amend. 14.

30. Constitutional Law ⇐268.2(3)

Defense counsel failed to establish need for investigative funds to permit him to journey to Illinois to interview possible witnesses for capital murder prosecution; value of investigation to trial as well as lack of alternative devices to fulfill same functions were not discernable, and denial of such funds did not violate principles of due process. U.S.C.A. Const.Amend. 14.

31. Criminal Law ⇐1206.1(2)

Death penalty statutes were not unconstitutional due to their failure to provide, by their terms, authorization for funds to allow indigent defendants to pursue and present mitigating evidence. 21 O.S.1981, § 701.11.

32. Homicide ⇐354

Fact that defense counsel had not heard of imposition of death penalty against black defendant for killing another black person did not establish that death penalty statutes resulted in arbitrary and capricious sentencing and had been applied in discriminatory manner, with respect to capital murder prosecution involving black defendant and white victim; statutory aggravating circumstances were supported by evidence, and jury was not influenced by passion, prejudice, or any other arbitrary factor in imposing death penalty. 21 O.S.1981, § 701.11, 21 O.S.Supp.1985, § 701.13.

An appeal from the District Court of Oklahoma County; William S. Myers, Jr., District Judge.

1. The voir dire of juror Mason culminated in the following:

Malcolm Rent Johnson, appellant, was convicted of Murder in the First Degree in Oklahoma County District Court, Case No. CRF-81-4939. Punishment was assessed as death. Judgment and sentence is AFFIRMED.

Thomas J. Ray, Jr., Asst. Public Defender, Oklahoma City, for appellant.

Michael C. Turpen, Atty. Gen., Mary F. Williams, Asst. Atty. Gen., Oklahoma City, for appellee.

OPINION

BUSSEY, Judge:

On appeal from his sentence of death for the murder of a seventy-six-year-old woman, Malcolm Rent Johnson presents seventeen (17) assignments of error.

The victim, Ura Thompson, was found dead and partially decomposed in her apartment on October 27, 1981. The medical examiner determined that the cause of death was suffocation, and that the victim suffered blows to the head and jaw, as well as forced intercourse.

Jewelry, furs and other valuables were discovered missing from the victim's apartment. The police were given consent to search the apartment where appellant lived with his girlfriend. The victim's typewriter, rings, watch, antique jar, keyrings, cigarette case, and hand mirror were among the items found in the apartment. The specimens of hair and body fluids obtained from appellant were found to match the unknowns discovered in the victim's apartment.

I

[1] As his second assignment of error (BI), appellant asserts that two prospective jurors were excluded for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Relevant portions of the record are set out in the margin.[1] Careful reading of the voir dire

THE COURT: Mr. Mason, if you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and

reveals that each venireman excluded had views concerning the death penalty which would substantially impair his ability to serve as a juror in this case. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This is the proper standard of review. Accordingly, this assignment of error is without merit.

II

As his third assignment of error (BII), appellant complains of the exclusion of negroes from the jury in violation of the Sixth Amendment to the United States Constitution. The record reflects that the prosecutor used peremptory challenges to exclude the last three black veniremen from the panel. (Tr. 408–409). The judge denied a defense motion for mistrial, finding no evidence of intentional discrimination. Defense counsel argued that the State excludes black veniremen from juries whenever a black is charged with killing a white. However, he offered no evidence in support of that assertion.

Until recently, the prosecutor's exercise of peremptory challenges was essentially inscrutable under the authority of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). There was a presumption that the prosecutor used the State's peremptory challenges to obtain a fair and impartial jury. The presumption was not overcome by allegations that all negroes were removed from the jury, or that they were removed from the jury because they were negroes. *See, Lee v. State*, 637 P.2d 879, 881–82 (Okl.Cr.1981) (discussing the requirements of *Swain*).

In the recent case of *Batson v. Kentucky*, — U.S. —, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the prosecutor may not use peremptory challenges to racially discriminate against a criminal defendant. No longer are peremptory challenges beyond review. If a defendant establishes prima facie the discriminatory use of peremptories, the burden shifts to the prosecutor to explain his or her actions. *Id.* at —, 106 S.Ct. at 1723.

[2, 3] To establish a prima facie case of purposeful discrimination in the selection of the petit jury, the defendant must demonstrate: first, that he or she is a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove from the venire members of that race; second, a defendant can rely on the fact that the prosecutor can use peremptories as a tool with which to discriminate; and third, that the facts and other relevant circumstances raise an inference that the prosecutor used that practice to discriminate against appellant. *Id.* at —, 106 S.Ct. at 1723. Once a prima facie showing is made, the prosecutor has the burden to offer a neutral explanation for challenging black jurors.

But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged the jurors of the defendant's race on the assumption—that they would be partial to the defendant because of their shared race ... [or] on the assumption that blacks as a group are unqualified to serve as jurors....

Id.

[4, 5] In the present case, prima facie discrimination was established.[2] This case was remanded to the trial court for a hearing on defendant's allegations and the prosecutor's explanations. Although a record was not specifically made concerning inferences which could be made from the relevant circumstances, the third element of a prima facie case, the removal of all remaining blacks from the venire gives rise to a reasonable inference of racial discrimination. The prosecutor was then required to come forward with his explanations for excusing the black veniremen. The prosecutor did his best to reconstruct from the record, his memory, and from his own policies his reasoning in removing the particular jurors. The explanations were both neutral and logical based upon the record before him.[3] Such an explanation is not required to rise to the level of a challenge for cause. *Id.* at —, 106 S.Ct. at 1723. We find this assignment to be without merit.

III

[6] As his fourth assignment of error (BIII), appellant contends that the jury did not comport with the Sixth Amendment, citing *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). He complains that the excusal of veniremen under *Witherspoon v. Illinois*, supra, denies a capital murder defendant a jury composed of a representative cross section of the community as required by such cases as *Taylor v. Louisiana*, supra. This contention is without merit. "Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." *Lockett v. Ohio*, 438 U.S. 586, 596–97, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978) (proper exclusion of jurors for cause under *Witherspoon* does not deprive a defendant of a jury chosen from a fair cross section of the community).

IV

Title 38 O.S.1981, § 28(A) provides in part that "persons over seventy (70) years of age shall not be compelled to serve as jurors in this State." Appellant contends as his fifth assignment of error (BIV) that the statute violates the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and that the judge erred in failing to quash the jury panel. Appellant offers no authority in support of his Eighth Amendment claim, rather relying upon the Sixth and Fourteenth Amendment requirement of a jury composed of a representative cross section of the community, as declared in such cases as *Taylor v. Louisiana*, supra, and *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

[7, 8] In order to establish a prima facie violation of the fair cross section requirement, it must be shown that the group alleged to be excluded is a distinctive group in the community; that the representation of that group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and that the underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren*, 439 U.S. at 364, 99 S.Ct. at 668. In

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if under the evidence, facts and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such, that regardless of the law, the facts and circumstances of the case that you would not consider inflicting the Death Penalty?
PROSPECTIVE JUROR MASON: Yes, sir.

The voir dire of juror Herbert was rather lengthy, but is well summarized in the following passage:

THE COURT: Mr. Herbert, I have problems. I must have misunderstood your questioning. Has your mind changed on this subject during this jury selection process?
PROSPECTIVE JUROR HERBERT: No.
THE COURT: Have you had the same opinion throughout?
PROSPECTIVE JUROR HERBERT: As far as the Death Penalty is concerned?
THE COURT: Yes.
PROSPECTIVE JUROR HERBERT: That's right.
THE COURT: Well, I may not have misunderstood you and I want to be real clear. Are you telling the Court and these lawyers that no matter what the evidence is and no matter what the law is, you could never vote for a Death Penalty? You could consider it, think about it, but when you got through thinking about, your mind's made up that you wouldn't vote for it in advance. Is that correct?
PROSPECTIVE JUROR HERBERT: Yes, sir.

2. The Court upheld the retroactive application of *Batson* in two cases decided January 13, 1987. Appellant's case is on direct appeal before us and falls within a class of cases to which the holding is retroactively applied.

3. Among the prime reasons offered by the prosecutor was: that one veniremen had a son the approximate age of appellant and may have over identified with him; one had two individuals in her immediate family who had been convicted of felonies; and, one was in a profession and of a faith both generally considered to disfavor the death penalty. See Evidentiary Hearing Transcript November 13, 1986, pages 14, 16, and 20.

the case at bar, appellant failed to establish a prima facie case. He consented to the determination of his motion to quash on the basis of the bare stipulation by the State that some of those seventy years of age and older summoned for jury duty in appellant's case would claim the statutory exemption. Tr. of Motion Hearing, March 11, 1982, pp. 4-7.

[9] We reject the suggestion that we should remand for an evidentiary hearing on this matter under 22 O.S.1981, Ch. 18, App.—Rules of the Court of Criminal Appeals, Rule 3.11. Trial counsel was aware of the proof requirements of a prima facie case under *Duren*, supra. Tr. of Motion Hearing, March 11, 1982, pp. 6-7. Since counsel made no attempt to offer the necessary proof, there is no reason for us to assume that it exists at this late stage.

We decline appellant's request upon this and other assignments of error that we remand under Rule 3.11. That rule is designed to permit the supplementation of the record on appeal, not the relitigation of factual questions determined in the trial court.

V

As his sixth assignment of error (CI), appellant contends that the judge erred in overruling in part his motion for pretrial discovery. The judge overruled requests for the names of defendants prosecuted by the Oklahoma County District Attorney during an 18 month period for raping women fifty-five years of age and older; the names of suspects in the case at bar prior to the arrest of appellant; and information involving any unsolved rapes of women fifty-five years of age or older on the north side of Oklahoma City between January 1, 1980, and January 25, 1982. He relies upon *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[10, 11] The suppression of evidence despite defense request is a denial of due process where the evidence is material to guilt or punishment, irrespective of the good or bad faith of the prosecutor. *Id.* at 87, 83 S.Ct. at 1196-97. The test of materiality is whether the requested evidence might have affected the outcome of the trial. *See, Hall v. State*, 650 P.2d 893, 897 (Okl.Cr.1982) (discussing the requirements of *Brady* in light of *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). We find no violation of *Brady*. The only requested information arguably material within the meaning of *Brady* had been disclosed to defense counsel. The defense had been advised by the State of the identity of the only other serious suspect in this case, an individual taken into custody prior to the time the defendant became a suspect. *See*, Tr. Motion Hearing, March 11, 1982, pp. 112-14.

VI

[12] As his seventh assignment of error (CII), appellant contends that incriminating evidence seized in the search of an apartment he shared with his girlfriend was the product of an illegal search. He acknowledges that his girlfriend consented to the search, but contends that her consent was ineffective as to the defendant. Aside from certain scholarly commentary, he cites only the dissenting opinion in *United States v. Stone*, 471 F.2d 170, 174 (7th Cir.1972) (Swygert, J., dissenting), *cert. denied*, 411 U.S. 931, 93 S.Ct. 1898, 36 L.Ed.2d 391 (1973).

This contention is not persuasive. The majority in *Stone* rejected the argument that the search of an accused's home shortly after his arrest pursuant to his wife's consent was invalid. The court relied upon the rule that where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and evidence thus discovered may be used against either. *Id.* at 173. *See also, United States v. Matlock*, 415 U.S. 164, 169-72, 94 S.Ct. 988, 992-93, 39 L.Ed.2d 242 (1974); *United States v. Mendonca*, 412 F.Supp. 613, 614 (W.D.Okl.1976), n. 1 and cases cited therein; *Nunley v. State*, 660 P.2d 1052 (Okl.Cr.1983), *cert. denied*, 464 U.S. 867, 104 S.Ct. 205, 78 L.Ed.2d 179; *Smith v. State*, 604 P.2d 139 (Okl.Cr.1979); and *Burkham v. State*, 53
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(Okl.Cr.1972); *Dimadis v.*
621 (Okl.Cr.1969); *Brown*
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Burkham v. State, 538 P.2d 1121 (Okl.Cr. 1975).

In the case at bar, defendant's girlfriend was the actual lessee of the apartment, and had at least equal right to the use and occupation of the premises. Her consent justified the search of the apartment.

VII

As his eighth assignment of error (CIII), appellant contends that his incriminating statements to the police should have been suppressed. He contends that such statements were the product of the illegal search of the apartment he shared with his girlfriend. This argument assumes the invalidity of the search, an assumption rejected above.

Appellant further contends that his statement should have been suppressed because of unnecessary delay in his initial appearance before a magistrate in violation of 22 O.S.1981, § 182. Appellant was initially arrested on an unrelated charge on the 27th day of October, 1981, and was arraigned on November 3, 1981.

We find this contention is without merit. After his arrest on the unrelated charge, the search of his apartment disclosed evidence making him a prime suspect in five other crimes, not including the homicide charged in this case. During the period of delay, investigators and prosecutors sifted the evidence and prepared various charges for filing.

[13, 14] It is the defendant's burden to show that he was prejudiced by delay in his initial appearance. *See, Dutton v. State*, 674 P.2d 1134 (Okl.Cr.1984), *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 850; *Stidham v. State*, 507 P.2d 1312 (Okl. Cr.1973); *Logan v. State*, 493 P.2d 842 (Okl.Cr.1972); *Dimadis v. State*, 456 P.2d 621 (Okl.Cr.1969); *Brown v. State*, 384 P.2d 54 (Okl.Cr.1963); and *In re Dare*, 370 P.2d 846 (Okl.Cr.1962). The fact that statements were taken from him prior to his initial appearance does not establish the necessary prejudice. *See, Stidham*, supra; *Brown*, supra; and *In re Dare*, supra.

[15] Finally, appellant contends that the interrogating officers improperly failed to advise him that his statements could lead to the imposition of the death penalty. He concedes that he was fully advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant's argument is not well taken. This Court has held that interrogation officers are not obliged to apprise the accused of the particular charges to be filed against him; the choice of charges to be filed, if any, is for the prosecutor. *See, Hardin v. State*, 649 P.2d 799 (Okl.Cr.1982). The same is certainly true as to whether a bill of particulars will be filed against a defendant and the death penalty sought.

The eighth assignment of error is without merit.

VIII

[16] As his ninth assignment of error (CIV), appellant asserts that the trial court erred in allowing evidence of aggravation to be heard in the first stage of the trial. He complains that the prosecution elicited from the assistant chief medical examiner that one experiencing the terror of being unable to breath would be under "some great mental anguish and apprehension." Tr, 728-29.

Any error in the admission of the evidence was harmless since the verdict in the first stage would have been the same, and since the evidence would have been admissible in the sentencing stage. *See, Chaney v. State*, 612 P.2d 269, 280 (Okl.Cr.1980), *rev'd in part*, 730 P.2d 1334 (10th Cir. 1984), *modified on other grounds*, 699 P.2d 159 (1985). The witness had testified that the victim died of traumatic asphyxia or suffocation; that either her airways were obstructed by some external object, or else pressure was exerted against her chest; that the victim did not die instantly, but rather would not have slipped into unconsciousness until after about three minutes, and that death would not have occurred for more than five and perhaps as many as six or seven minutes; that the

experience would be akin to drowning; and that fecal material deposited beneath the body could have resulted from the strain attendant upon the victim's struggle against her lack of breath. It is unreasonable to assume that the incremental effect of the challenged evidence adversely affected the appellant.

IX

[17] As his eleventh assignment of error (EI), appellant contends that the infliction of the death penalty for felony murder violates the Eighth and Fourteenth Amendments in the absence of a finding that the accused killed with premeditation or malice aforethought. He argues that the death penalty in such a case makes no measurable contribution to deterrence or retribution.

This assignment of error is not well taken. In *Hatch v. State*, 662 P.2d 1377, 1384, (Okl.Cr.1983), *cert. denied*, — U.S. —, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986), this Court reviewed the objectives and policy of the felony murder statutes. As noted therein, the felonies specified are crimes which by their very commission pose a threat to human life. Proscribing such conduct under the first degree felony murder statute performs the rational function of deterring the commission of felonies so inherently dangerous as to create foreseeable risks of death.

Statutes providing the death penalty for felony murder based on less than premeditation or express malice aforethought have been upheld against constitutional challenge. *See, e.g., Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980); and, *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158. While one who does not himself kill, attempt to kill or intend that a killing take place or that lethal force be employed in the commission of a felony may not suffer the extreme sanction, *see, Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the evidence amply supports the conclusion in the case at bar that the appellant alone caused the death of the victim by suffocation after brutally raping her.

X

[18] As his twelfth assignment of error (EII), appellant complains of the admission in the penalty phase of State's Exhibit No. 88. That is a document representing appellant's Illinois conviction for burglary of a dwelling. Tr. of Stage Two Proceedings, March 23, 1982, pp. 16–17, 18–19, and 22. Appellant argues that the exhibit did not reflect a crime involving the use or threat of violence to the person, and hence was not admissible in support of the aggravating circumstance that "[t]he defendant was previously convicted of a felony involving the use or threat of violence to the person." 21 O.S.1981, § 701.12(1). *See, Brewer v. State*, 650 P.2d 54, 62 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1150, 103 S.Ct. 794, 74 L.Ed.2d 999 (1983).

We need not determine whether the exhibit was admissible in support of the aggravating circumstance stated, for it was clearly admissible in support of a second aggravating circumstance relied upon by the State, i.e., that there existed "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." 21 O.S.1981, § 701.12(7). The conviction was specifically alleged in the supplemental Bill of Particulars, O.R. 36, 37, ¶ (4), as support for the "continuing threat" circumstance. Although the crime was not one against the person, it was nevertheless probative, in combination with other factors, of appellant's propensity to commit criminal acts. *See, Duffy v. State*, 567 S.W.2d 197 (Tex.Cr.App.1978), *cert. denied*, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 666, (burglary of a habitation, forgery and three felony theft convictions held admissible to support an aggravating factor similar to Section 701.12(7)).

XI

[19] As his thirteenth assignment of error (EIII), appellant complains that the judge erred in receiving evidence of other crimes in the second s
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Johnson v. State, 665
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XII

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judge erred in receiving evidence of other crimes in the second stage, and that the evidence was insufficient to support the aggravating circumstance that there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1981, § 701.12(7). He complains of the use of evidence of other unadjudicated rapes committed by appellant, concerning which criminal charges were then pending. His contention that the evidence was insufficient to support the aggravating circumstance is apparently based on the assumption that this evidence was inadmissible.

This contention is without merit:

> [E]vidence of a defendant's criminal record, or prior unadjudicated acts of violent conduct is relevant to the determination of whether the defendant is likely to commit future acts of violence that would constitute a continuing threat to society.... [I]t is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage.

Johnson v. State, 665 P.2d 815, 822, 823 (Okl.Cr.1982).

XII

[20] As his fourteenth assignment of error (EIV), the appellant contends that the jury instructions in the penalty phase violated state and federal constitutional provisions. He first asserts that the judge erred in failing to instruct that the jury had the right to sentence the defendant to life in prison even if they found that the aggravating circumstances were not outweighed by the mitigating circumstances. This argument is not well taken. The idea that the jury may decline to impose the death penalty even if aggravating circumstances are not outweighed by mitigating circumstances is subsumed within an instruction that if the jury finds one or more aggravating circumstances they may consider imposing the death penalty, i.e., that they could, but did not have to, impose death in that event.

The jury were not instructed that they *must* assess death if aggravating circumstances were found which were not outweighed by mitigating circumstances. Rather, they were instructed that they "*could* be authorized to *consider* imposing a sentence of death" (emphasis added) if an aggravating circumstance were found. Instruction No. 8, O.R. 141. They were also instructed that they did "not necessarily have to find the existence of either mitigating or aggravating circumstances in this case and if you so determine, the foreman should sign the verdict form for life without checking any of the boxes." Instruction No. 7, O.R. 140. *See also, Davis v. State*, 665 P.2d 1188, 1203–1204 (Okl.Cr. 1983), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, and *Burrows v. State*, 640 P.2d 533, 544 (Okl.Cr.1982), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983).

[21] Appellant next asserts that the judge improperly instructed the jury not to "allow sympathy, sentiment or prejudice to affect you in reaching your decision." O.R. 143. He concedes that this Court has previously approved the giving of such instructions. *See, Davis*, 665 P.2d at 1203; *Parks v. State*, 651 P.2d 686, 693–694 (Okl. Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983); and *Brewer*, supra. However, he urges the reconsideration of our position in light of *People v. Easley*, 34 Cal.3d 858, 196 Cal. Rptr. 309, 671 P.2d 813 (1983).

In *Easley*, the majority were of the view that an instruction similar to that in the case at bar denigrated the defendant's right to present and have fairly considered mitigating circumstances tending to suggest that death is not the appropriate sentence. They reasoned that the instruction "in effect told the jury not to give any weight to the bulk of the evidence proffered by the defendant." *Easley*, 196 Cal. Rptr. at 323, 671 P.2d at 827.

However, the majority position was questioned by a concurring justice and a dissenting justice. In particular, Justice Mosk stated that, although the judgment must be reversed due to other error,

I cannot join the majority in its criticism of the instruction barring the jury from being swayed by mere sympathy.... In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant.

196 Cal.Rptr. at 327, 671 P.2d at 831. Such expression is similar to the reasoning of this Court in *Brewer*, 650 P.2d at 60-61:

In addition, 21 O.S.1981, § 701.13(C)(1) requires this Court, in reviewing the death sentence to determine whether it was imposed under the influence of passion, prejudice or *any other arbitrary factor*. The trial court's instruction against sympathy was designed to prevent 'arbitrary' influences such as sympathy for the victim or her family from affecting the jury's decision.

We find no reason to depart from our previous holding.

Moreover, the court in *Easley* rejected an argument that the adjudged defect was cured by other instructions in that case. An alleged narrative instruction did not advise the jury that it could consider as a mitigating factor any aspect of the defendant's character or background. The court stated that the alleged curative instruction itself could be said to have limited the jury's consideration of additional mitigating factors to those relating to the gravity of the crime, excluding those relating to the general character, family background or other aspects of the defendant.

In the course of submitting to the jury in the instant case some twenty-six possible mitigating factors, the trial judge instructed that "you are not limited in your consideration to these minimum mitigating circumstances. You must consider any additional mitigating factor you find from the evidence in this case. What are and what are not additional mitigating circumstances is for you the jury, to determine," O.R. 137, and that "mitigating circumstances" are "circumstances that throughout one's lifetime are favorable factors which would call for the reduced sentence. What are and what are not mitigating circumstances is for you, the jury, to decide. You may consider anything you want as mitigation." O.R. 138. It is thus manifest that the judge's instructions gave the fullest possible latitude for the consideration of evidence in mitigation.

[22] Appellant next asserts under this assignment of error that the judge improperly authorized the jury "to consider all the evidence received here in open court presented by the State and the defendant throughout the trial of the case before you." O.R. 143. He contends that this permitted the jury to consider nonstatutory aggravating circumstances in addition to evidence in aggravation not the subject of pretrial notice to the defendant under 21 O.S.1981, § 701.10.

This contention is without merit. In *Parks*, 651 P.2d at 694, this Court held that the first stage evidence may be received in the second stage. Such procedure was found to conform fully to the mandate of *Lockett v. Ohio*, supra, that the sentencer consider not only the defendant's record and character but any circumstances of the offense. Moreover, such procedure does not violate the statutory requirement of pretrial notice. The purpose of the pretrial notice requirement is to apprise the defendant of evidence relevant to sentencing which will be introduced for the first time in the sentencing hearing. That purpose is not served by requiring pretrial notice of evidence relevant both to guilt and punishment and thus admissible in both stages. *See, Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982), *cert. denied*, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 293.

[23] Appellant finally contends that the judge erred in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating. He also contends that the 21 O.S. 1981, § 701.11 is unconstitutional for failure to require as much. This contention is without merit.

The "burden of proof" analysis is not strictly applicable to the weighing process:

It is well settled, as defendant points out, that our constitution protects an accused against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re: Winship*, (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 375. Our statute follows this proscription and provides that the State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances. However, the determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt, but is a balancing process.

Daniels v. State, 453 N.E.2d 160, 171 (Ind. 1983).

The fourteenth assignment of error is without merit.

XIV

[25] As his sixteenth assignment of error (EVI), appellant complains that the judge erred in the second stage by failing to take the case from the jury and imposing a sentence of life imprisonment. He relies upon 21 O.S.1981, § 701.11, supra. We have not had occasion to consider what constitutes a "reasonable time" within which the jury must decide punishment under Section 701.11. However, the courts of North Carolina have construed a similar provision, N.C.Gen.Stat. § 15A-2000(b), as committing the determination of what constitutes a "reasonable time" to the discretion of the trial judge.

In *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979), the court determined that three hours and thirty-nine minutes was not an unreasonable length of time for deliberations, and that the judge did not abuse his discretion in denying a request that he dismiss the jury after two hours and thirty-nine minutes of deliberations. In *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), the appellate court determined that seven and one half hours did not constitute an unreasonable time. The court reasoned that the trial judge was in the best position to determine how much time is reasonable under the facts of a specific case, including the number of aggravating and mitigating circumstances confronting the jury.

In the case at bar, second stage deliberations commenced at 8:59 p.m. on the evening of March 23, 1982. At 11:36 p.m., the jury returned to the courtroom and requested the report of the medical examiner as to the condition of the victim's face and chest. The request was denied, since the report had not been received into evidence. However, the judge took the opportunity to advise the jury that they could recess for the night and return the next day to continue deliberations. The foreman expressed the view that a verdict could be reached within possibly another hour. At 12:15 a.m., the judge denied the defense request that he dismiss the jury and enter a sen-

ure to require as much. This contention is without merit.

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It is well settled, out, that our constit cused against con proof beyond a rea ery fact necessary t with which he is ch *ship*, (1970) 397 U.S 1068, 1073, 25 L.E statute follows this vides that the State reasonable doubt the one of the enumera cumstances. Howe tion of the weight aggravating and mit es is not a 'fact' wh beyond a reasonable ancing process.

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The fourteenth assi without merit.

XIII

[24] As his fifteenth rer (EV), appellant cont erred in refusing to inst a unanimous decision could not be reached, t pose a sentence of life relies upon that part § 701.11 which states cannot within a reasona to punishment, the judg jury and impose a sen ment for life." Howeve injunction is "an instru court, not for the jury." 438 So.2d 336, 346 (Al would amount to an inv to avoid the difficult du tence upon the life of *Burrows*, supra. We fi *Davis*, supra; *Parks*, su *Johnson*, 298 N.C. 355 (1979). *But see, State* So.2d 619 (La.1980).

tence of life in prison under the statute. The jury returned its verdict at 12:35 a.m.

We find no abuse of discretion. The jury deliberated at most three hours and thirty-five minutes. They were faced with the task of considering twenty-six mitigating and three aggravating circumstances. This assignment of error is without merit.

XV

[26] As his seventeenth assignment of error (EVII), appellant contends that the Oklahoma death penalty statutes are unconstitutional due to the failure of the State to demonstrate that the death penalty fulfills a compelling state interest which cannot be gratified by less drastic means. He relies upon *Commonwealth v. O'Neal*, 369 Mass. 242, 339 N.E.2d 676 (1975). This argument was firmly rejected by this Court in *Burrows*, supra, and *Glidewell v. State*, 663 P.2d 738, 743 (Okl.Cr.1983). *See also, Davis*, supra. The *O'Neal* approach predates the decision of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and the rationale employed in *O'Neal* was ultimately rejected in *Gregg*.

XVI

Appellant assigns as his first assignment of error (AI) the denial of his pretrial request for funds to explore and prove a defense using expert witnesses, and further claims the death penalty statutes are unconstitutional in their failure to provide an indigent defendant funds to explore and present mitigating evidence, or to provide for investigation by the State into mitigating factors.

More particularly, appellant asserts that he was entitled to the assistance of a forensic chemist to counter the State's use of such witnesses. He also insists that the State should have provided funds for the employment of a psychiatrist to determine whether appellant was competent at the time of the crime. Appellant's other main contention is that the right to present evidence in mitigation at the sentencing hearing in a capital case required that an indigent defendant be provided with State assistance in procuring such evidence. In this respect, defense counsel sought funds prior to trial to journey to Chicago, Illinois, to interview possible witnesses for use at the sentencing proceeding, and also sought money for the employment of a psychiatrist to explore the possibility of mitigating evidence.

[27] Due process of law may require that the State provide an indigent defendant access to an expert witness. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). In *Ake*, the United States Supreme Court held that the defendant suffered deprivation of constitutional safeguards when he was denied the assistance of a psychiatrist to explore and present his only defense of insanity. In that case, evidence of the defendant's mental instability was especially apparent and he had demonstrated that his sanity at the time of the offense was to be a significant factor at trial. The risk of inaccurate resolution of sanity issues being extremely high, and yet the consequences of error great, the Court held the expense to the State was justifiable.

[28] In the case at bar, the request for a psychiatrist was based on little more than the assertion that a young man who would sexually assault and slay an elderly woman is not sane. However, this does not amount to a showing that his sanity at the time of the offense would be a significant factor at trial. Without more, it cannot be said that appellant was denied due process in not being provided access to a psychiatrist.

Indeed, appellant's defense at trial was that he did not commit the offenses. The theory he attempted to prove was that his nephew committed the crimes. Appellant did not plead insanity and his evidence at trial did not suggest this defense. The State did not make psychiatric evidence an issue at trial. *Liles v. State*, 702 P.2d 1025 (Okl.Cr.1985) *cert. denied*, — U.S. —, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986).

Therefore, we find no cor
vation in this regard.

[29] Appellant also re
hire a forensic chemist
State's scientific evidence
included blood type and
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We reach the same c
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1986).

[30] Defense counsel
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was the only way to obtair
desired instead of alterna
as the use of mails, teleph

Therefore, we find no constitutional deprivation in this regard.

[29] Appellant also requested funds to hire a forensic chemist to contest the State's scientific evidence. That evidence included blood type and presence of antigen in the blood and semen found on the victim, her clothing and bedding. Tests for the presence of sperm were also conducted and admitted. Comparison was made between hairs and fibers found at the crime scene with those removed from appellant and his clothing, and a chemist testified concerning her conclusions.

The techniques used and manner of investigation were discussed on direct and on cross-examination. The test results were available for discovery prior to trial. The experts called were forthright concerning their findings and the limitations inherent in the tests and investigation. *See, Moore v. Zant*, 722 F.2d 640 (11th Cir.1983) wherein the court held that in a similar case where similar tests were utilized, and where as here the experts were not alleged nor shown to be biased, the constitution was not violated by denying a criminal defendant his own experts.

We reach the same conclusion in the instant case. Appellant did not demonstrate to the trial court that the tests or results were seriously in question. Moreover, we do not consider the risk of inaccurate resolutions from the scientific tests involved such that due process of law is threatened if a defendant is denied access to independent experts. The Court's opinion in *Ake* weighed this factor heavily in evaluating whether constitutional safeguards were endangered. *See additionally, Plunkett v. State*, 719 P.2d 834 (Okl.Cr. 1986).

[30] Defense counsel sought public funds to permit counsel to journey to the State of Illinois to interview possible witnesses. Counsel failed to disclose the details of the hoped for contacts, and failed to indicate that personal contact by counsel was the only way to obtain the information desired instead of alternate methods such as the use of mails, telephone or subpoena, *see*, 22 O.S.1981, §§ 721–724. The value of the investigation to the trial as well as the lack of alternative devices to fulfill the same functions are not discernible. *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). It is significant to note that the trial court subsequently provided state funds for the transportation of members of appellant's family from Chicago to Oklahoma City to appear as witnesses in the second stage of trial. It does not appear that counsel established the need for the investigative funds.

[31] Appellant asserts also in this assignment that our death penalty statutes are unconstitutional relying on cases which have held death penalty statutes unconstitutional which prevent the sentencer in all capital cases from considering mitigating factors in assessing punishment. *See, Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). We find this assignment to be without merit. Our death penalty statutes require the sentencer to weigh mitigating against aggravating circumstances. 21 O.S.1981, § 701.11. Also, they have previously been upheld as not inflicting cruel or unusual punishment. *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983). Appellant's contention that they must be unconstitutional because they do not by the terms of the statutes provide authorization for funds to allow indigent defendants to pursue and present mitigating evidence is unsupported.

[32] Appellant compares his case to certain cases his counsel is familiar with in Oklahoma County District Court to support his contention (CVIII) that Oklahoma's death penalty statutes have resulted in arbitrary and capricious sentencing and has been applied in a discriminatory manner in violation of the U.S. Constitution. He argues that in equally heinous or worse cases, some individuals have received life sentences. However, these cases are not in evidence before us. Nor has appellant

offered a comparison of mitigating circumstances present in each of these cases. His claim of discrimination is based solely on the fact defense counsel has not heard of imposition of the death penalty against a black person for killing another black person. We do not consider appellant's final claim meritorious.

In all capital cases, this Court is charged with making the determinations of whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and, whether the evidence supports the jury's finding of certain statutory aggravating circumstances. 21 O.S.Supp.1985, § 701.13.

Two statutory aggravating circumstances were found to exist by the jury. The first was that the defendant had previously been convicted of a felony involving the use or threat of violence to the person. And, the second was that there existed a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. We have found that each finding is supported by the evidence. And from our review of the record, we cannot say that the jury was influenced by passion, prejudice, or any other arbitrary factor. The evidence of guilt and of the aggravating circumstances is substantial.

Finding no error warranting reversal or modification, judgment and sentence is AFFIRMED.

BRETT, P.J., concurs.

PARKS, J., not participating.

Raymon HAYMAKER and Jewell Haymaker, Appellants,

v.

OKLAHOMA CORPORATION COMMISSION and Union Texas Petroleum Corporation, Appellees.

No. 63792.

Released for Publication by Order of the Court of Appeals of Oklahoma, Division Nos. 2 and 4.

Court of Appeals of Oklahoma, Division Nos. 2 and 4.

Aug. 26, 1986.

As Emending Nov. 17, 1986.

The Corporation Commission denied mineral owners' application for increased well density, and mineral owners appealed. The Court of Appeals, Brightmire, P.J., held that there was not substantial evidence to support Commission's decision where there was substantial evidence that waste would occur if second well was not drilled.

Order vacated and cause remanded.

1. Administrative Law and Procedure ⇐763, 791

Mines and Minerals ⇐92.15, 92.21

Corporation Commission has wide discretion in performance of its legal duties, and its findings of fact and legal conclusions must be upheld by reviewing court unless findings are not supported by substantial evidence, or conclusions are contrary to law.

2. Administrative Law and Procedure ⇐791

Mines and Minerals ⇐92.21

"Substantial evidence" required to support order of Corporation Commission is that which possesses substance and relevance and will induce conviction that order made was proper.

See publication Words and Phrases for other judicial constructions and definitions.

3. Mines and Minerals ⇐9:

In determining whether quest for permission to drill established and productive 8 unit, Corporation Commissio mine whether requested wel in illegal waste, and whethe offend correlative rights of eral owners.

4. Mines and Minerals ⇐47

"Correlative rights" are duties which exist between m with regard to common source bon supply.

See publication Words an for other judicial construc definitions.

5. Mines and Minerals ⇐47

Each mineral owner shar source of supply is entitled t and gas beneath his land.

Mines and Minerals ⇐47

One owner has no right to damage, or maliciously deple source of supply or do anythi prives another owner of reasor tunity to extract his fair share bon deposit.

7. Mines and Minerals ⇐92.38

Denial of request for pe drill second well on established tive 80-acre spacing unit wa ported by substantial evidence was substantial evidence that w occur if second well was not dr was no evidence of any adverse among area owners or that rig other mineral owner would be o granting application, and appli present intention to drill. 21 § 86.2.

Appeal from Order of the Okla poration Commission.

Application by mineral owner creased well density to permit an well to be drilled within an estab acre spacing unit for the purpos ducing otherwise unrecoverable

86-7054

AFFIDAVIT OF SERVICE 86-[redacted]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS M. LAHIFF, JR., being duly sworn, does depose and say:

1. Pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, I served the foregoing Petition For Writ Of Certiorari on counsel for respondent by depositing the document on April 28, 1987, in a United States mailbox, with first-class postage prepaid addressed to:

Robert Henry, Attorney General
State of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

2. All parties required to be served have been served.

Thomas M. Lahiff, Jr.
THOMAS M. LAHIFF, JR.

Subscribed and sworn to
this 28th day of April, 1987

Janis Barrett
Notary Public

JANIS BARRETT
Notary Public, State of New York
No. 41-4700392
Qualified in Queens County
Commission Expires March 30, 1988

OPPOSITION

BRIEF

EDITOR'S NOTE

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CLERK

NO. 86-7054

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

MALCOLM RENT JOHNSON,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE*
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*Counsel of Record

August, 1987

QUESTIONS PRESENTED

1. Do the Eighth and Fourteenth Amendments require state courts to appoint psychiatrists to assist capital defendants present mitigating evidence in cases in which sanity of the Defendant is not an issue and in which the state does not present psychiatric testimony to establish future dangerousness?

2. Do the Eighth and Fourteenth Amendments require state courts to appoint non-psychiatric experts (herein a forensic chemist) absent a showing of a reasonable probability that such expert would be of assistance to the defense and that denial of such expert assistance would result in a fundamentally unfair trial?

3. Did the "no sympathy" jury instruction herein violate the Eighth and Furteenth Amendments by discounting legitimate mitigating evidence or did it properly limit jury consideration to permissible factors in aggrevation and mitigation and thus properly guide the jury's sentencing discretion?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MALCOLM RENT JOHNSON, Petitioner,	)	
vs.	)	No. 86-7054
THE STATE OF OKLAHOMA, Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Robert H. Henry, Attorney General of Oklahoma, appearing on behalf of the Respondent, State of Oklahoma, respectfully submits this as the response to the Petition for Writ of Certiorari filed herein.

STATEMENT OF THE CASE

Petitioner, hereinafter Defendant, was tried and convicted of First Degree Murder in the District Court of Oklahoma County, Oklahoma. He was sentenced to death and that sentence has been affirmed on appeal by the Oklahoma Court of Criminal Appeals. Johnson v. Oklahoma, 731 P.2d 993 (Okl.Cr. 1987). Before trial Petitioner's counsel moved for appointment of certain experts to be provided at public expense. The trial court denied this request. We will discuss the basis for that request and its results move fully in the argument portion of this response.

The Oklahoma Court of Criminal Appeals summarized the case against the Defendant as follows:

> The victim, Ura Thompson, was found dead and partially decomposed in her apartment on October 27, 1981. The medical examiner determined that the cause of death was suffocation, and that the victim suffered blows to the head and jaw, as well as forced intercourse.
>
> Jewelry, furs and other valuables were discovered missing from the victim's apartment. The police were given consent to search the apartment where appellant lived with his girlfriend. The victim's typewriter, rings, watch, antique jar, keyrings, cigarette case, and hand mirror were among the items found in the apartment. The specimens of hair and body fluids obtained from appellant were found to match the unknowns discovered in the victim's apartment.

Johnson v. Oklahoma, 731 P.2d 993, 997 (Okl.Cr. 1987). Citations to transcript pages which follow are to the transcript of trial (Tr. ___) or to the penalty stage of trial (P.S Tr. ___).

The medical examiner conducted an autopsy on the body of Ms. Ura Thompson on the morning of October 28, 1981 (Tr. 696). His external examination revealed that the victim, an elderly woman who was unclothed except for nylon knee stockings, showed signs of injury or trauma (Tr. 697-716). However, he determined that the victim had not been strangled (Tr. 719). He then made an internal examination of the victim (Tr. 718). Initially, the doctor determined that the victim had been in good health at the time of death (Tr. 720-721). The doctor found further that the victim had a tear in her left ear canal which was due to a direct blow (Tr. 7210. In the doctor's opinion this injury could have been the result of the victim having been hit or having had her head pushed against a solid object such as the floor (Tr. 722). The doctor also determined that the victim had received an injury to her jaw, and that her vagina showed signs of forced intercourse (Tr. 726). At trial the doctor testified that immediately prior to the victim's death, she had been the victim of some firm, forcible object injuring substantially in many areas, the inside of her vagina (Tr. 725-726). He added that this injury could have resulted from an erect penis (Tr. 726). As a result of the examination, the doctor determined that the victim died of traumatic asphyxia or suffocation (Tr. 726). He concluded her death occurred within a few moments after she became unconscious (Tr. 728). The doctor further determined that there was neither alcohol nor carbon monoxide present in the victim's blood (Tr. 731).

Pursuant to the consent to search, police seized a portable Olivetti typewriter and case, two key rings, a pink chalk glass antique jar, a lady's Bulova watch with diamond chips, and several other items from the apartment shared by Defendant and his girlfriend (Tr. 793-794). During the search and seizure the police observed several items which she did not seize at the time. However, the next day Eugenia Johnson (Defendant's girlfriend) brought to the police station several other items, including a

gold trimmed cigarette case and a small double hand mirror (Tr. 795-796). Ms. Johnson stated that she was moving from her apartment located at 2801 North Robinson and that the items did not belong to her (Tr. 796, 816). At the Defendant's trial Frank Thompson, a relative of the victim, identified several of the items seized from Ms. Johnson's apartment as being similar to the ones owned by the victim (Tr. 831). Thompson also identified the Oliveti typewriter as being similar to the one owned by his aunt (Tr. 834). Additionally, other family members identified several of the items as being similar or identical to one they had either given the victim or has previously seen in her apartment (Tr. 836, 838, 840, 842).

Once in custody the Defendant was given his Miranda warnings and was interviewed by the police. During one such interview Officer Cook informed the Defendant that the Defendant's semen had been found in the victim. The Defendant became excited and stated, "You couldn't have found semen in her, I didn't come." (Tr. 913).

The body samples taken from the Defendant were subsequently analyzed and compared with samples and specimens removed from the victim's body and specimens of human hair and semen removed from the victim's bed (Tr. 966-974). The forensic chemist who performed the analysis and made the comparisons determined that semen was present in the swab taken from the victim's vagina and that semen was present in the stains on the victim's bed and knee stockings. (Tr. 974-975). The chemist further determined that the donor of the semen had the antigens of "B" plus "H" and had the body type "B" (Tr. 978, 986). Her analysis of the Defendant's body samples and blood type revealed that he was a secreter of antigens "B" and "H" and that he has type "B" blood (Tr. 990-992). Thus, the chemist concluded that the Defendant could have been the donor.

In further analyzing the other evidence, the chemist determined that the three scalp hairs found on the victim's bedspread were microscopically consistent with the known samples of the Defendant's scalp hair (Tr. 997). She also found that the scalp hair fragment removed from the flat sheet on the victim's bed was consistent with the Defendant's scalp hair and the pubic

hair removed from the pillowcase, the carpet, and the victim's knee stockings were microscopically consistent with the Defendant's scalp and pubic hairs (Tr. 996-998). In the process of testing and analysing the hairs to determine the microscopic consistency, the forensic chemist noted an unusual event (Tr. 995). She observed that there was a blue discoloration of the tip of the known hairs removed from the Defendant's underarms (Tr. 995). She and her assistant stated that this coloration could have come from the dye in the blue shirt seized from the Defendant which he could have been wearing at the time he committed the crime (Tr. 1001, 1143). The chemist also found blue fiber fragments on the victim's pubic hairs (Tr. 1001).

Because the Defendant had implicated his brother, Rodney Johnson, the Oklahoma City Police Department obtained a blood sample, hair samples and a saliva sample from him (Tr. 1164). These samples were subsequently submitted to the crime laboratory where the forensic chemist analyzed and compared these known samples to the results of the evidence taken from the victim. The chemist determined that the Defendant's brother had type "O" blood and even though he was also a secreter, he could only secrete the "H" antigen (Tr. 1166). Thus, he could not have been the donor of the semen found in the victim's vagina and stockings and also on the victim's bedding.

Additionally, since blue fibers were found at the scene and on the victim's pubic hairs, and since several of the investigating police officers at the scene wore blue uniforms, the chemist made a comparison of the fibers in the uniforms to that from the crime scene (Tr. 971). The comparison revealed that the fibers from the crime scene were totally inconsistent (Tr. 972-974).

The Defendant was subsequently found guilty of Murder in the First Degree. The State then presented evidence to support the Bill of Particulars. That evidence established that the Defendant has sustained two prior convictions of rape, two prior convictions of robbery and one prior conviction of burglary (P.S. Tr. 16-22). The State also presented evidence which established that the

Defendant had perpetrated the rape of two other elderly women, the attempted rape of a third elderly woman and an assault and battery of a fourth woman during the time period just prior to the present case (P.S. Tr. 36-37, 45-47, 52-53, 83-85).

SUMMARY OF THE ARGUMENT

The Defendant wholly failed to make a satisfactory showing in the trial court that psychiatric testimony would be of material assistance to his defense. His defense was not insanity and the State did not introduce psychiatric testimony to establish future dangerousness. Under such circumstances, the rule of Ake v. Oklahoma, should not be expanded to require the appointment of a psychiatric expert in all capital cases regardless of the use of such experts by the state, because to do so would provide little genuine assistance to capital defendants while imposing a heavy financial burden on the states.

Likewise, the Defendant made only a conclusory request for a court appointed chemist. Neither the defense motion nor argument thereon established a reasonable probability that a chemist would be of assistance to the defense and that denial of an expert chemist would result in a fundamentally unfair trial. Having failed to make a preliminary showing, there was no denial of due process in the failure of the state courts to appoint an expert witness.

The jury instructions in Defendant's trial sought only to prohibit the reliance by the jury on arbitrary emotional factors in capital sentencing. This instruction is consistent with the theme of capital sentencing cases in that it sought to channel the the juries' discretion to relevant, rather than irrelevant and arbitrary factors. Therefore, the Defendant was not deprived of due process and his execution would not amount to cruel and unusual punishment.

PROPOSITION I

CAPITAL DEFENDANTS ARE NOT ENTITLED TO STATE FINANCED PSYCHIATRIST IN THE PUNISHMENT PHASE WITHOUT A SHOWING THAT MENTAL STATE IS A FACTOR.

In Barefoot v. Estelle, 463 U.S. 880, 896-97 (1983), this Court rejected a defense suggestion that psychiatric testimony could not properly be used by the state to demonstrate future dangerousness during the sentencing portion of a capital trial. The Defendant herein makes precisely the opposite argument: the Defendant contends that the state must provide psychiatric assistance on future dangerousness even when the mental state of the Defendant is not an issue and even when the state itself does not rely on psychiatric testimony. Nothing in this Court's decision in Ake v. Oklahoma, 470 U.S. 68 (1985), or in common sense or fundamental fairness requires such a conclusion.

We believe that the Court needs to be apprised of the threadbare showing of need for psychiatric testimony made to the original trial court by this Defendant in order to put the legal issues in context. The language set out at page 5 of the Petition, though discussing appointment of experts, came during discussion of another motion, and not while discussing appointments of experts as the Defendant might have the Court believe. The Defendant filed a motion for funds for expert witnesses before the trial court (O.R. 28-32). That motion asks for appointment of a psychologist or psychiatrist both to assist with determination of sanity at the time of commission of the crime as well as to assist with mitigating evidence. However, the Defendant did not plead insanity and his evidence at trial did not suggest that defense. Rather, the Defendant attempted to prove that his nephew committed the crimes. Johnson v. Oklahoma, 731 P.2d 993, 1006 (Okl.Cr. 1987). Therefore, the Defendant does not assert before this Court that he needed a psychiatrist in order to help determine issues of sanity within the meaning of Ake, supra, even though he made a pretrial request in his motion for assistance for that purpose.

Defendant's pretrial motion asserted there was a need to determine whether the Defendant had ability to distinguish right from wrong at the time he allegedly committed the acts charged and that such a determination was relevant and material in determining

guilt. With regard to the need for psychiatric testimony in mitigation, the defense motion state:

> It is further necessary for determining mitigating circumstances as authorized in 21 O.S. 1976 Supp. § 701.10.
>
> Clearly, if an expert testified that defendant was under the influence of extreme mental or emotional distress, had a low I.Q., or was under the influence of some mental disease which rendered him less capable of living up to standards of law, would be factors which would amount to mitigating evidence under this section and under Lockett v. Ohio, supra. Precluding the defendant from being tested by these experts limits mitigating circumstances in defiance of Lockett, supra.

(O.R. 29-30). We can hardly imagine a more conclusory assertion of need for psychiatric assistance in mitigation than was presented in this motion.

The following colloquy took place between Defendant's counsel, Mr. Ravitz, the Court, and the Prosecutor, Mr. Albert, during the argument of this motion:

MR. RAVITZ: Judge, I also have a motion which goes hand-in-hand. And I understand the Court having to do this. I have a motion for expert witnesses. I request a psychiatrist because my client, if he committed these particular crimes, I think there's a question he knew right from wrong at the time. There were six or seven other cases where the State initially filed rape cases severly dismissed on other women.

I think anybody who's 25 years old who goes around raping people over 65 needs to have a doctor determine whether he knows right from wrong at the time of the acts.

I would ask for a psychiatrist. I would ask that the Court appoint a chemist, an independent chemist to allow me to conduct tests and use what is commonly referred to as--a new thing called electrophoresis, which--

THE COURT: What is that? I never heard of that.

MR. RAVITZ: This is something where they can break down the enzyme grouping in the semen and conclude whether my client is or is not the perpetrator of the sex act.

MR. ALBERT: He's overstating that, Your Honor. They cannot do that.

MR. RAVITZ: They can eliminate my client.

MR. ALBERT: Well, may be. A blood grouping can do that.

THE COURT: But I'm back to the same--I appointed you an expert before and the Court of Criminal Appeals reversed it. Said you can't do it. I appreciate what you're saying. I understand it. But I'm not going to do it. I've got to follow the Court of Criminal Appeals. Be overruled.

MR. RAVITZ: Judge, I have a motion which probably--

THE COURT: You've got to convince them out there. That's who you've got to convince.

MR. RAVITZ: I've tried.

THE COURT: Take it on up to the Supreme Court of the United States.

MR. RAVITZ: When they affirm one of my capital cases on this ground, I'm going to have to, Judge, because there's no opportunity to present mitigating evidence if you're indigent in this county. I'd like the record to so show that (emphasis added).

Transcript of Proceedings on Motion, January 28, 1982, pp. 19-20.

Defense counsel did nothing whatsoever to make a demonstration of genuine need of psychiatric testimony in mitigation.

In Ake, supra, this Court recognized that a defendant's mental intention is not necessarily at issue in every criminal proceeding and that it is unlikely that psychiatric assistance of the kind discussed in Ake would be of probable value in cases where it is not. Id. 470 U.S. at 82. However, the court went on to note that when a defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for assistance of a psychiatrist is readily apparent. Id. 470 U.S. at 82-83. The court held that when a Defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. Id. 470 U.S. at 83. The court went on to state that its forgoing discussion of the issue compelled a similar conclusion in the contest of a capital

sentencing proceeding, when the state presents psychiatric evidence of the defendant's future dangerousness. Id. 470 U.S. at 83 (emphasis added).

The present Defendant now urges the court to expand this constitutional entitlement to relieve him of the responsibility for demonstrating that sanity is to be a significant factor in trial, even in a case in which the state does not rely on psychiatric testimony to establish future dangerousness. We believe such an extension of Ake would wrench that case from its factual foundations. The court reached its conclusion in Ake based upon certain pertinent facts. These were that Ake's sole defense was insanity, his behavior at arraignment was bizarre enough to prompt the trial judge, sua sponte, to have him examined for competency, the state psychiatrist found him incompetent, that after treatment he could only attend trial while sedated under large doses of thorazine, and that psychiatrists described the intensity of Ake's mental illness less than six months after the offense and suggested that his illness might have begun many years earlier. Id. 470 U.S. at 86. Further, Oklahoma recognized a defense of insanity which placed the initial burden of producing evidence on the defendant. Id. 470 U.S. at 86. Taken together, these factors made clear that Ake's sanity was likely to be significant factor in his defense. Id. 470 U.S. at 86. As shown above, Defendant herein failed utterly to make a comparable showing that his mental condition would be a significant factor in his defense or in mitigation of punishment. We believe the rule proposed by the Defendant would tip the balance of private interests, governmental interests, and the value of additional substitute procedural safeguards, relied upon in Ake in favor of the state. On the facts of Ake, the court found the private interest in the accuracy of a criminal proceeding "almost uniquely compelling." Id. 47 U.S. at 78. However, under facts of the present case, the private interest in psychiatric assistance, without a showing of need, is minimal. On the other hand the interest of the state becomes greater. In Ake the court rejected the argument that the cost of psychiatric assistance would be

"staggering". Id. 470 U.S. at 78. Of course, Ake was a case in which the need for psychiatric assistance was clear. However, under the Defendant's rule, psychiatric assistance would be an entitlement divorced from any showing of need or from the fact that the state had itself employed psychiatrist. The expansion of a constitutional entitlement to psychiatric assistance from the rare case in which sanity is a significant factor to every capital case in which future dangerousness is an issue would genuinely impose a "staggering" financial burden on the state. Additionally, in those cases in which sanity is not an issue and in which the state does not employ psychiatrist on the issue of future dangerousness, the state does not enjoy a tactical advantage which can "cast a pall on the accuracy of the verdict obtained." Ake, supra 470 U.S. at 79.

Finally, alternative lay testimony may be employed to demonstrate lack of future dangerousness or a defendant's deposition to make a well-behaved and peaceful adjustment to life in prison as in Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 1, 9 (1986). Thus, it becomes clear that there are additional or substitute procedural safeguards which argue against a constitutional entitlement to psychiatric assistance in the present case.

Several courts of appeals have upheld convictions against Ake challenges where the defendant has not made the showing required in Ake. See Cartwright v. Maynard, 802 F.2d 1203, 1213 (10th Cir. 1986); and Volson v. Blackburn, 794 F.2d 173, 176 (5th Cir. 1986); Bowden v. Kemp, 767 F.2d 761, 762 (11th Cir. 1985).

The Defendant in the present case asks the court to virtually legislate the existance of a constitutional entitlement to psychiatric assistance in all cases in which future dangerousness is an issue, divorced from the presence of psychiatric testimony in the state's case on punishment. Such a rule is wholly unnecessary. Ake itself sets out basic requirements which govern the entitlement of capital defendants to state funded psychiatric testimony in those cases in which such testimony is truly necessary. The Ake standards are more than sufficient to protect

the rights of capital defendants who genuinely need such testimony. We respectfully ask the court to decline the Defendants invitation to expand the Ake rule beyond the facts and circumstances which gave rise to it.

PROPOSITION II

DEFENDANT FAILED TO MAKE AN ADEQUATE SHOWING OF NEED FOR COURT APPOINTMENT OF A CHEMIST.

As noted above, the Defendant filed a pretrial motion seeking appointment of certain experts. The text of the scanty argument on that motion is set out in Proposition I above. The pertinent portions of a text requesting appointment of a chemist are as follows:

> The State of Oklahoma in filing a Notice of Other Offenses, August 4, 1980, had indicated they intend to introduce evidence of an alleged rape of one of the victims. Counsel has further been told by the State's own chemist, a chemist employed by the Oklahoma City Police Department that seman, sperm and cloth samples tested by the State are consistent with the blood type group of the defendant and cloth found at the scene. Counsel desires to make an independent investigation through the use of his own chemist to determine whether this is correct. Further counsel would state that a chemist who is also an expert on electrophoresis is necessary. The concept of electrophoresis has been used on prior occasions by the District Attorney's office. This concept breaks semenial samples not merely into blood type but enzyme grouping and can eliminate a defendant as being the perpetrator of the crime.

(O.R. 31). Based upon this showing, the Court of Criminal Appeals found that the Defendant did not demonstrate to the trial court that the tests or results were seriously in question. Johnson v. Oklahoma, 731 P.2d 993, 1007 (Okl.Cr. 1987). In ruling against the Defendant, the Court below noted that the techniques used and manner of investigation were discussed on direct and on cross-examination and that the test results were available for discovery prior to trial. Id. 731 P.2d at 1007. The experts called were forthright concerning their findings and the limitations inherent in the tests and investigation. Id. 731 P.2d at 1007. Relying on the first opinion in Moore v. Zant, 722 F.2d 640 (11th Cir. 1983), the Court of Criminal Appeals found that where experts were not

alleged or shown to be biased the Constitution was not violated by denying a criminal defendant his own experts. Johnson, supra, 731 P.2d at 1007. Finally, the Court of Criminal Appeals did not consider the risk of inaccurate resolution from the scientific test involved so great that due process is threatened if a Defendant is denied access to independent experts, noting that this Court's opinion in Ake weighed this factor heavily in evaluating whether constitutional safeguards were in danger. Id. 731 P.2d 1007.

In Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. ___, 86 L.Ed.2d 231, 236 n. 1 (1985), this Court found that it had no need to determine as a matter of federal constitutional law what showing, if any, would have entitled a Defendant to assistance of a court appointed criminal investigator, fingerprint expert, and ballistics expert, where the defense requests included little more than the general statement that the requested experts would be of "great necessarius witness." This Court found no deprivation of due process in denial of the requested expert because it characterized the request as offering little more than undeveloped assertions that the requested assistance would be beneficial. Id. 86 L.Ed.2d at 236 n. 1. Despite the Defendant's characterizations to the contrary, his pretrial motion was no more substantial than the one found lacking by this Court in Caldwell. It recited that his attorney wished to make an independent investigation to determine the correctness of the police chemist's finding that semen, sperm, and cloth samples were consistent with the defendant's guilt. Next, the defence alleged that an expert on electrophoresis was necessary to try to eliminate the defendant as the perpetrator of the crime. In essence, the defense hoped to "fine tune" the tests which had already pointed toward the guilt defendant in order to try to exclude him from consideration. Significantly, the defence motion did not indicate where it could secure such an expert. Also, from the abbreviated argument on this motion set out in Proposition I above, it is clear that defense counsel was intent on building a record rather than making a serious and well supported attempt to secure expert assistance.

The courts of appeal are beginning to devise rules under which to consider defense request for non-psychiatric experts under Ake and Caldwell. Most conspicuously, we invite the Court's attention to the recent ruling of the Eleventh Circuit in Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987). In that care Judge Tjoflat's opinion for a divided court stated:

> Ake and Caldwell, taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert, due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Id. 809 F.2d at 712. The Eleventh Circuit noted that requiring trial courts, both state and federal, to provide expert assistance would place a substantial, if not onerous, burden on the administration of criminal justice because it would require a trial court to appoint a defense expert for every expert available to the government; provide for expert assistance whether such assistance turned out to be needed; and provide for any additional experts the appointed experts might need to explore theories that could aid the defense in cross-examining prosecution witnesses or in presenting the defenses case. The court questioned the wisdom of such due process requirement absence a substantial showing, such as the one made in Ake, of a significant benefit to the truth seeking function at trial. Id. 809 F.2d at 712, n. 8.

In Moore, the defense had filed a pretrial motion seeking appointment of a "criminologist or other expert witness" reciting that the defendant understands that there are certain tests which can be run which might conclusively prove whether or not the hair samples found are those of defendant, but neither defendant nor his counsel has the necessary funds or expertise to perform said test. Id. 809 F.2d at 714, n. 14, para. 7 of motion. This language is substantially identical to that found in the present Defendant's motion cited above. In argument before the trial

court. Moore's attorney even identified a specific expert who he believed could perform the test and estimated his fee. Id. 809 F.2d at 716. Based on the evidence presented to the original trial court, the Eleventh Circuit Opinion of Judge Tjoflat found that the defense showing failed to create a reasonable probability that expert assistance was necessary to the defense and that without such assistance the defendant's trial would be rendered unfair. Id. 809 F.2d at 717-18.

Judge Hill writing for himself and Judges Roney, Chief Judge Fay, and Judges Edmondson and Henderson, wrote an opinion specially concurring in the denial of the Ake in Moore claim in which he stated:

> A valid claim by the defendant that he was not at the scene of the crime ordinarily may be supported effectively at trial in a wide variety of ways. Regardless of the nature of the prosecution's proof on such an issue, expert testimony constituted but one of the many effective means by which such a claim might be substantiated. In this case, appellant offered little but his own testimony to rebut the evidence presented by the prosecution to show that he was at the scene of the crime when it occurred and had committed it. I certainly would not hold, however, that simply because appellant's defense was weak on the facts and methods of proof otherwise available to him, he was constitutionally entitled to the assistance of experts to help him develop and support his theory of the case before the jury. Further, appellant was not entitled to the assistance of his own experts simply because the state relied in part upon expert testimony to prove its case. The purpose of providing expert assistance to the defendant is not to even the score. The accuracy-enhancing value of affording expert assistance to the defendant and the risk of an erroneous determination of guilt if such assistance is not provided are not increased significantly in a case like appellant's by the extensive use of experts by the state or by the defendant's inability to present any other evidence in support of the defense he chooses to assert. Those circumstances might render expert assistance to such a defense helpful, but they do not render such assistance significantly more essential to the accurate determination of whether the defendant committed the crimes with which he was charged. To extend Ake as appellant suggests would impose an extraordinarily far-reaching and costly burden on the states and their taxpayers. There are obviously many important issues in criminal trials whose presentations could conceivably be enhanced by expert testimony. Ake, however, is a narrow holding premised upon the peculiar role psychiatric testimony necessarily plays in the assertion of an insanity defense or, in a capital sentencing proceeding, evaluating mental condition as an aggravating or mitigating circumstance.

Id. 809 F.2d at 737. Thus, under either the formulation of Judge Tjoflat's opinion or the opinion of Judge Hill, the defendant in Moore was not entitled to relief on a showing no better than that found in the present case. See also, Coleman v. Brown, 802 F.2d 1227, 1236-37 (10th Cir. 1986) (declining to decide whether the Constitution requires appointment of a private investigator to aid the defense in preparation for trial because defendant failed to make adequate showing of benefit under Caldwell) and United States v. Greshner, 802 F.2d 373, 377 (10th Cir. 1986) (declining to decide whether Constitution required appointment of penologist because defendant had not made adequate showing as a predicate for constitutional claim relying on Coleman and Caldwell).

The court below did not rule that the Constitution never requires appointment of non-psychiatric experts. It merely held that this Defendant had not demonstrated to the trial court that tests or results were seriously in question or that those performing the tests were biased or that there was a risk of inaccurate resolution of the scientific issues. Johnson v. State, supra, 731 P.2d at 1007. The courts of appeals are requiring a preliminary showing, similar to that required by this Court in Ake, before deciding whether the constitution requires appointment of non-psychiatric experts. These resolutions are consistent with this court's action in Caldwell.

The fact that a particular service might be of benefit to an indigent Defendant does not mean that the service is constitutionally required. Ross v. Moffitt, 417 U.S. 600, 616 (1974). The state need not duplicate the legal arsenal which might be retained but must assure the Defendant an adequate opportunity to present his claims. Id. 417 U.S. at 616.

We respectfully ask this Court not to grant certiorari because the question does not require resolution by this Court and because the Defendant herein did not make any necessary showing of need for non-psychiatric experts.

PROPOSITION III

A JURY INSTRUCTION FORBIDDING CONSIDERATION OF ARBITRARY FACTORS IN CAPITAL SENTENCING IS CONSTITUTIONAL.

The Defendant complains that the trial court charged the jury, prior to closing argument, that it should not allow sympathy, sentiment or prejudice to affect it in reaching its decision. The jury was further instructed that it should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing the sentence. Unaccountably, this Defendant seems to object to a prohibition of arbitrary factors in capital sentencing.

In California v. Brown, 479 U.S. ___, 107 S.Ct. ___, 93 L.Ed.2d 934, 939-40 (1987), this Court stated:

> The Eighth Amendment jurisprudence of this Court establishes two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." Eddings, supra at 110, 71 L.Ed.2d 1, 102 S.Ct. 869, quoting Lockett, supra at 604, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26.

In her concurring opinion, Justice O'Connor stated:

> Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant and not an emotional response to the mitigating evidence, I agree with the Court that an instruction informing the jury that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution.

Id. 93 L.Ed.2d at 942. Indeed, we must respectfully submit that the goal of recent capital litigation in this Country has largely been to devise a system of criminal justice in which arbitrary capital sentencing would be outlawed.

The instruction under consideration in Brown informed the jury that it must not be swayed by "mere" sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Id. 93 L.Ed.2d at 938. This Court considered that instruction to be no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. Id. 93 L.Ed.2d at 941. After that observation the Court stated:

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, supra, at 305, 49 L.Ed.2d 944, 96 S.Ct. 2978. Indeed, by limiting the jury's sentencing considerations to record evidence the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process. See Roberts v. Louisiana, 428 U.S. 325, 335 and n. 11, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976) (opinion of Stewart, Powell and Stevens, J.J.).

Id. 93 L.Ed.2d at 941.

In this Court's recent opinion in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 440, 452 (1987), the Court invalidated a Maryland statute requiring the introduction of a victim impact statement at the sentencing phase of a capital murder trial as violative of the Eighth Amendment. In doing so, the Court used the following language:

> As we have noted, any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra, at 358,

> 51 L.Ed.2d 393, 97 S.Ct. 1197 (opinion of Stevens, J.). The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.

Id., 96 L.Ed.2d at 452. We believe the Court's opinions in Brown and Booth, taken together, stand for the proposition that capital sentencing requires reasoned decision-making and cannot be influenced by caprice or emotion either for or against the defendant. It could only be an unjust desire for unilateral advantage which would compel a capital defendant to seek the benefit of arbitrary emotion on his behalf while opposing on behalf of the victims or their families as was prohibited in Booth.

The jury instruction used in the present case comports with the principles announced in Brown. We respectfully suggest that this Court does not need to grant certiorari to consider the precise wording of each and every "no sympathy" instruction used throughout the nation, especially in cases in which the instruction clearly comports with the rationale in Brown. Likewise, we do not think the present Defendant adds anything to his presentation by cutting snipets of the prosecutor's argument out of context and listing them in an attempt to demonstrate the prosecution belittled the defense case in mitigation. We would hope that trial counsel in a capital murder case would likewise attempt to belittle the state's case in aggravation. However, nothing in the record of the present case indicates that the Defendant was denied the right to introduce or argue proper mitigating testimony. We therefore believe no relief is appropriate.

CONCLUSION

For reasons set out above, we respectfully suggest that the decision of the Court below comports with applicable opinions of this Court and that there is no compelling reason to grant

certiorari to review this decision. We respectfully ask the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

MALCOLM RENT JOHNSON *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 86-7054. Decided October 5, 1987

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Oklahoma Court of Criminal Appeals insofar as it left undisturbed the death sentence imposed in this case. But even if I did not hold this view, I would grant this petition for certiorari for two reasons. First, the trial court incorrectly decided an unsettled question of law concerning an accused's right to the assistance of experts in preparing his defense. Second, the trial court's instructions at the sentencing hearing, in combination with the prosecutor's closing argument, deprived petitioner of his right to have the sentencing jury consider all of the mitigating evidence he offered.

I

Petitioner Malcolm Johnson was charged with the first-degree murder of Ura Thompson, an elderly woman who had been raped and suffocated in her apartment. Recognizing that the prosecution's case against petitioner rested largely on the opinion of a police chemist, who would testify that petitioner's hair, blood, semen, and clothing were consistent with physical evidence found in Thompson's apartment, petitioner's counsel requested the court prior to trial to appoint a chemist to aid in petitioner's defense. Counsel argued that a

chemist was needed to challenge the police chemist's qualifications and testimony and to conduct an electrophoresis test, which even the prosecution conceded could show that petitioner was not the perpetrator of the crime. The trial court agreed with counsel that the appointment of a chemist was warranted, but denied the request on the ground that the Oklahoma Court of Criminal Appeals previously had rejected the view that criminal defendants were entitled to the assistance of such experts. Response to Pet. for Cert. 8.

At trial, the prosecution presented two kinds of evidence. First, the prosecution offered evidence showing that petitioner had in his possession at the time of his arrest several items missing from Thompson's apartment. Second, the prosecution presented the testimony of the police chemist. The prosecutor referred to the chemist's testimony as the "real crux" of the state's case against petitioner. Pet. for Cert. 15. The jury convicted petitioner of first-degree murder.

During a separate sentencing proceeding, defense counsel offered mitigating evidence relating to petitioner's personal background. Witnesses testifying on behalf of petitioner stated, for example, that petitioner's father frequently had beaten petitioner and his mother, that petitioner's parents eventually had separated, that petitioner had grown up in poverty, and that petitioner as a youngster had suffered from a mysterious and debilitating illness requiring a long hospital stay. Immediately after defense counsel offered this evidence, the trial court instructed the jury. As part of the charge, the trial court stated that "you should not allow sympatny, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence." Pet. for Cert. 19. After the delivery of these instructions, the prosecutor gave his closing argument, in which he ridiculed the mitigating evidence that petitioner's counsel had offered. The prosecutor stated:

> I've got great empathy for his folks. But so what? . . . [H]is parents divorced when he was young. Oh, wow. . . . That's a mitigating factor for violent conduct. That's bologna. . . . Deprivation builds character. We ought to have fewer silver spoons in the mouths of our children and a little more deprivation. He wants to use that as a mitigating circumstance. . . . I was offended by what happened in this courtroom when the little children were placed on the witness stand to try to generate sympathy for a cold-blooded killer. . . . So what if he was sick or retarded: What's that got to do with—we're dealing with what he is today. . . . Not whether he had a disease when he was a baby, not whether he was mildly retarded at some time in his life.

Pet. for Cert. 20–21. At the close of the sentencing hearing, the jury recommended a sentence of death, and the court imposed that sentence.

II

This Court long has acknowledged that when a state brings criminal proceedings against an indigent defendant, it must take steps to ensure that the accused has a meaningful opportunity to present a defense. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353 (1963); *Griffin* v. *Illinois*, 351 U. S. 12 (1956). Although the state need not purchase for an indigent defendant all of the services that the wealthy may buy, see *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974), the state must provide the defendant with the "basic tools of an adequate defense," *Britt* v. *North Carolina*, 404 U. S. 226, 227 (1971). We recently have begun to confront the questions of whether and when expert assistance is such a basic tool. In *Ake* v. *Oklahoma*, 470 U. S. 68, 80 (1985), we recognized that when a defendant's mental condition is at issue, the assistance of a psychiatrist is "crucial to the defendant's ability to marshal his defense" and the state must therefore provide psychiatric assistance. A few months later, in *Caldwell* v. *Mississippi*,

472 U. S. 320, 323 n. 1 (1985), we reserved the equally important questions of whether and when an indigent defendant is entitled to non-psychiatric expert assistance. This case demonstrates the pressing need to consider and resolve those questions.

The denial of petitioner's request for the appointment of an expert chemist resulted in a fundamentally unfair trial in two respects. First, the denial prevented petitioner from raising doubts about the strength of the state's evidence against him. The prosecution's case against petitioner rested largely on the testimony of the police chemist that petitioner's bodily fluids, hair, and clothing comported with samples found at the scene of the crime. We previously have recognized that "'[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury.'" *Ake* v. *Oklahoma*, *supra*, at 81 n. 7 (quoting F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970)). Without expert assistance, a defendant will usually be powerless to create doubts in the jury's mind about such testimony's strength or correctness. As Justice (then Chief Judge) Cardozo once stated, a defendant is "at an unfair disadvantage if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him." *Reilly* v. *Berry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929). Petitioner here was at such a disadvantage with respect to testimony that the prosecutor termed the "real crux" of the State's case. Second and equally important, the denial of the request for expert assistance prevented petitioner from gaining potentially conclusive exculpatory evidence in support of his affirmative alibi defense. As petitioner's counsel explained to the trial court, petitioner desired expert assistance partly because he wanted to undergo a test that could have conclusively disproved his commission of the crime. In *Little* v. *Streater*, 452 U. S. 1 (1981), this Court held that a state's refusal to pay for a blood-grouping test in the context of a quasi-criminal proceeding to establish paternity violated the requirements of due process. Yet the trial court here effectively prevented an accused charged with a capital offense from gaining access to a similar kind of test. By denying petitioner the chance to obtain potentially conclusive exculpatory evidence, as well as by denying him the means to challenge the testimony of the police witness, the rejection of the request for expert assistance deprived petitioner of a meaningful opportunity to present a defense.

III.

In *California* v. *Brown*, 479 U. S. —— (1987), this Court upheld a jury instruction cautioning jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital murder trial. In holding that the instruction did not suggest to the jury that it should disregard sympathetic aspects of the accused's background or character, the Court argued primarily that by cautioning the jury not to rely on "*mere* sympathy," the instruction directed the jury to ignore "only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Id.*, at ——. In a concurring opinion, JUSTICE O'CONNOR stated that although this jury instruction, taken alone, was constitutional, courts must recognize and guard against the possibility that instructions "attempt[ing] to remove emotion from capital sentencing," especially when combined with certain kinds of prosecutorial remarks, will mislead juries into thinking that they should ignore mitigating evidence about a defendant's background or character. *Id.*, at ——. I continue to believe that any instruction forbidding the sentencer to take sympathy into account "precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court's requirement that all mitigating evidence be considered." *Id.*, at —— (BRENNAN, J., dissenting). But even under the major-

ity's view in *Brown*, the instructions in this case, when considered in conjunction with the prosecutor's comments, diverted the jury from its constitutional duty to consider all mitigating evidence introduced by the defendant at the sentencing phase of the trial.

The problem in this case arises both from the trial court's instruction to the jury and from the prosecutor's closing argument. The instruction cautioned the jury to disregard not "*mere* sympathy," but "sympathy" in general, which surely includes the sympathy deriving from petitioner's mitigating evidence. The prosecutor's closing argument emphatically endorsed the suggestion that the jury should disregard the mitigating evidence petitioner had offered. By consistently ridiculing the evidence relating to petitioner's background—by saying time and again "so what?"—the prosecutor indicated that such evidence was irrelevant to the sentencing determination. Thus, the conjunction of the court's antisympathy instruction and the prosecutor's closing argument diverted the jury from considering the factors of background and character that this Court has decreed a jury *must* take into account in reaching a sentencing determination.

IV

The handling of this case almost ensured that petitioner would not prevail at either the guilt phase or the sentencing phase of his trial. The denial of the request for expert assistance deprived petitioner of a meaningful opportunity to contest his guilt. The court's antisympathy instruction and the prosecutor's closing argument denied petitioner a fair chance to challenge the appropriateness of the death penalty. Because I believe that the trial court unconstitutionally stacked the deck against petitioner at both stages of this capital proceeding, I would grant the petition for certiorari.